MISSISSIPPI LAW JOURNAL

TRIBUTE TO JUDGE WILLIAM C. KEADY

JUDGE WILLIAM C. KEADY AND THE BILL OF RIGHTS

Justice James Lawton Robertson

JUDGE WILLIAM C. KEADY AND THE LAW OF SCIENTIFIC EVIDENCE

John M. Conley & John B. Garver, III

RACE, REDISTRICTING AND RETROGRESSION IN MISSISSIPPI AFTER THE 2000 CENSUS

Frederick G. Slabach

CONSTITUTIONAL LAW AND CIVIL RIGHTS SYMPOSIUM, PART I

RETHINKING FREE EXERCISE OF RELIGION AFTER *SMITH* AND *BOERNE*: CHARTING A MIDDLE COURSE

Arnold H. Loewy

CONSTITUTIONAL REMEDIES, SECTION 1983 AND THE COMMON LAW

Michael Wells

METHOD IN INTERPRETATION: PRACTICAL WISDOM AND THE SEARCH FOR MEANING IN PUBLIC LEGAL TEXTS

Rev. Robert John Araujo, S.J.

THE SIGN OF "THE FOUR": JUDICIAL ASSIGNMENT AND THE RULE OF LAW

Jonathan L. Entin

CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC BROADCASTERS MAY EXCLUDE POLITICAL CANDIDATES FROM DEBATES AS LONG AS EXCLUSION IS REASONABLE AND VIEWPOINT-NEUTRAL

VOLUME 68 **FALL 1998** **NUMBER 1**

RECENT DECISIONS OF THE MISSISSIPPI APPELLATE COURTS

THE UNIVERSITY OF MISSISSIPPI
LAW
1854
LAW CENTER

Keep your office informed with a subscription with a subscription to the *Mississippi Law Journal* briefs of decisions of the Mississippi Supreme Court and Mississippi Court of Appeals.

Briefs are written by *Journal* members and mailed by Tuesday of the week after the decisions are rendered, several weeks before cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only $60.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Mississippi Law Journal
P.O. Box 849
University, Mississippi 38677-0849

The *Mississippi Law Journal* is published three times annually in April, August, and December. Editorial and business offices: *Mississippi Law Journal* Post Office Box 849, University, Mississippi 38677.

Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the subscriber sends notice of termination.

Change of address: Send address changes directly to the *Mississippi Law Journal*. Include name, new address (including zip code), and old address. Please notify 45 days in advance to ensure prompt delivery.

Unless a claim is made for nonreceipt of *Journal* within 6 months after the mailing date, the *Mississippi Law Journal* cannot be held responsible for supplying those issues without charge.

Third class postage paid at University, Mississippi 38677 and additional mailing offices.

Contributors are requested to submit manuscripts in 12 point type, double-spaced in hard copy form and on a 3.5′″ diskette in WordPerfect 6.0, 6.1, 8 or an easily convertible format. Submissions may also be sent electronically to:

mslj@sunset.backbone.olemiss.edu.

All submissions should be addressed to:

Executive Articles Editor
Mississippi Law Journal
P.O. Box 849
University, MS 38677

Citations conform to A UNIFORM SYSTEM OF CITATION (16th ed. 1996).

The *Mississippi Law Journal* is a member of the National Conference of Law Reviews.

To offer its contributors complete freedom, the *Journal* assumes no responsibility for the views expressed herein.

RECENT DECISIONS OF THE MISSISSIPPI APPELLATE COURTS

Keep your office informed with a subscription with a subscription to the *Mississippi Law Journal* briefs of decisions of the Mississippi Supreme Court and Mississippi Court of Appeals.

Briefs are written by *Journal* members and mailed by Tuesday of the week after the decisions are rendered, several weeks before cases are printed in the regional reporter. You can receive this weekly publication and be up to date for only $60.00 per year—an indispensable service! Subscribe now, or write for a free sample of the most current briefs.

Mississippi Law Journal
P.O. Box 849
University, Mississippi 38677-0849

The *Mississippi Law Journal* is published three times annually in April, August, and December. Editorial and business offices: *Mississippi Law Journal* Post Office Box 849, University, Mississippi 38677.

Current subscription: $35.00 per year. Single issue: $12.00. Subscriptions are renewed automatically upon expiration unless the sub-

ERRATA

Please note the inadvertent placement of an extra word in *Augmenting the Public Trust: The Secretary of State's Efforts to Create a Public Trust Ecosystem Regime in Mississippi*, 67 MISS. L.J. 613, 651 (1998).

On page 651, paragraph 2, line 5, the sentence now reads,

For over 100 years, a succession of owners of the land had not paid property taxes to the state.

The corrected sentence should read as follows:

For over 100 years, a succession of owners of the land had paid property taxes to the state.

Robert C. Khayat Scholarship Endowment

The *Mississippi Law Journal* established the endowment in February of 1995 to honor the dedicated service of Robert C. Khayat, former Law Journal member, professor, and now University Chancellor, and to assist distinguished men and women of the *Journal* in the pursuit of their legal education at the University of Mississippi. As of February 25, 1998 the corpus of the endowment was $33,161.36. Each year deserving *Journal* members are awarded scholarships as selected by the Executive Board of the *Journal*. This year $1,500 was awarded to Journal members. Please help us increase the corpus of the endowment so that we can increase the number and size of these scholarships.

Checks should be made payable to and mailed to:

The University of Mississippi Foundation
Post Office Box 8288
University, MS 38677

Please note on your check that your gift is designated for the Robert C. Khayat Scholarship Endowment.

Contributions are tax deductible.

Administrative Officers of the University of Mississippi

Robert C. Khayat	*Chancellor*
Gerald W. Walton	*Provost and Vice Chancellor for Academic Affairs*
Don L. Fruge	*Vice Chancellor for University Advancement*
Rex Deloach	*Acting Vice Chancellor for Administration and Finance*
Carolyn Ellis Staton	*Associate Provost and Associate Vice Chancellor for Academic Affairs*
Richard H. Mullendore	*Vice Chancellor for Student Life*
Andrew P. Mullins, Jr.	*Special Assistant to the Chancellor*
Samuel M. Davis	*Dean of the School of Law and Professor of Law*

The Law School Faculty

Guthrie T. Abbott, *Butler, Snow, O'Mara, Stevens and Cannada Lecturer in Law and Professor of Law*
Donna D. Adler, *Associate Professor of Law*
Richard L. Barnes, *Leonard B. Melvin, Jr. Lecturer in Law and Professor of Law*
Deborah H. Bell, *Professor of Law*
John R. Bradley, *Professor of Law*
Charles H. Brower, II, *Croft Visiting Assistant Professor of Law*
Larry S. Bush, *Professor of Law and Director of the Cambridge Summer Session*
William M. Champion, *Professor Emeritus and Mississippi Defense Lawyers Association Distinguished Lecturer Emeritus*
George C. Cochran, *Professor of Law*
Aaron S. Condon, *Professor Emeritus of Law*
John Czarnetzky, *Assistant Professor of Law*
Robert N. Davis, *Associate Professor of Law*
Thomas R. Ethridge, *Professor Emeritus of Law*
D. Michael Featherstone, *Professor of Law*
Don L. Fruge, *President-CEO of the University of Mississippi Foundation and Professor Emeritus of Law*
Stephen Gorove, *Professor Emeritus of Law*
Karen O. Green, *Professor of Law*
Timothy L. Hall, *Mitchell, McNutt, Threadgill, Smith & Sams Lecturer and Associate Professor of Law*
Michael H. Hoffheimer, *Professor of Law and Mississippi Defense Lawyers Association Distinguished Lecturer*
Mary B. Jensen, *Director of Law Library and Assistant Professor of Law*
Robert C. Khayat, *Chancellor and Professor of Law*
Susan Leimer, *Director of Legal Writing and Acting Assistant Professor of Law*

THOMAS R. MASON, *Director of Public Service Internship and Professor of Law*
RICHARD MCLAUGHLIN, *Director of Mississippi-Alabama Sea Grant Legal Program and Associate Professor of Law*
ROBERT MINK, *Assistant Director of Legal Writing and Acting Assistant Professor of Law*
GARY MYERS, *Associate Professor of Law*
LARRY J. PITTMAN, *Associate Professor of Law*
TERRIE L. ROBINSON, *Assistant Professor of Law*
RONALD J. RYCHLAK, *Associate Dean of Academic Affairs and Professor of Law*
CAROLYN ELLIS STATON, *Assistant Provost, Associate Vice Chancellor for Academic Affairs and Professor of Law*
GEORGE W. STENGEL, *Professor Emeritus of Law*
BARBARA PHILLIPS SULLIVAN, *Associate Professor of Law*
BRYN R. VAALER, *Professor of Law*
ROBERT A. WEEMS, *Mississippi Defense Lawyers Association Distinguished Lecturer and Professor of Law*

ADJUNCT PROFESSORS

JOHN DUFF, *Adjunct Professor of Law*
JOHN HAILMAN, *Adjunct Professor of Law*
BENJAMIN HARDY, *Adjunct Professor of Law*
POPE MALLETTE, *Adjunct Professor of Law*
FARRISH PERCY, *Adjunct Professor of Law*
BENJAMIN SANDERS, *Adjunct Professor of Law*
AMY WHITTEN, *Adjunct Professor of Law*

Digitized by the Internet Archive
in 2012 with funding from
LYRASIS Members and Sloan Foundation

http://archive.org/details/mississippilawjo68just

Mississippi Law Journal

Published by Students at the
University of Mississippi School
of Law

VOLUME 68 **FALL 1998** **NUMBER 1**

Copyright © 1998 Mississippi Law Journal, Inc.

EXECUTIVE BOARD 1998-99

Editor-in-Chief
DAVID SHELTON

Executive Editor
JASON MCCORMICK

Executive Articles Editors
JOHN BRALEY
KATE MARGOLIS

Business Manager
MEREDITH MESSER

Notes & Comments Editor
BILL MOORE

Mississippi Cases
BILLY RYAN

ASSOCIATE EDITORS

Articles
RYAN BECKETT
JAY COGGIN
JOEY DUDEK
WENDY HOLLINGSWORTH

Notes & Comments
BERKLEY ETHERIDGE
KIM SANDS

Mississippi Cases
PAUL MAPLE
ERIC RAY

Index & Review
TRAVIS LACKEY

DEVELOPMENTAL EDITOR
WILL ALLEN

Administrative Assistant
PEGGY C. NAIL

Faculty Advisors
GUTHRIE T. ABBOTT
MICHAEL HOFFHEIMER
ROBERT WEEMS

Staff

Laura Barbour
Billy Berryhill
Trabue Bland
Rebecca Bourland
Trey Bourn
Kelly Bridgforth
Amy Brown
Erin Christ
Rick Davis
Mitchell Driskell
Michael Dunavant
Trent Favre
Jennifer Gingery
Matt Harris
Jennifer Hawks
Michael Hewes
Ray Hill
David Humphreys
Paige C. Jones
Cliff Kling
Doug Morgan
Donna Pinion
Alison Ryan
Michelle Smith
Lendy Van Slyke
Ben Watson

Mississippi Law Journal

**Published by Students at the
University of Mississippi School
of Law**

VOLUME 68 **FALL 1998** **NUMBER 1**

Copyright © 1998 Mississippi Law Journal, Inc.

TRIBUTE TO JUDGE WILLIAM C. KEADY

JUDGE WILLIAM C. KEADY AND THE BILL OF RIGHTS
.... *Justice James Lawton Robertson* 3

JUDGE WILLIAM C. KEADY AND THE LAW OF SCIENTIFIC EVIDENCE
.... *John M. Conley & John B. Garver, III* 39

RACE, REDISTRICTING AND RETROGRESSION IN MISSISSIPPI AFTER THE 2000 CENSUS
.... *Frederick G. Slabach* 81

CONSTITUTIONAL LAW AND CIVIL RIGHTS SYMPOSIUM, PART I

RETHINKING FREE EXERCISE OF RELIGION AFTER *SMITH* AND *BOERNE*: CHARTING A MIDDLE COURSE
.... *Arnold H. Loewy* 105

CONSTITUTIONAL REMIDIES, SECTION 1983 AND THE COMMON LAW
.... *Michael Wells* 157

METHOD IN INTERPRETATION: PRACTICAL WISDOM AND THE SEARCH FOR MEANING IN PUBLIC LEGAL TEXTS
.... *Rev. Robert John Araujo, S.J.* 225

THE SIGN OF "THE FOUR": JUDICIAL ASSIGNMENT AND THE RULE OF LAW
.... *Jonathan L. Entin* 369

RECENT DECISION

Constitutional Law—First Amendment—Public Broadcasters May Exclude Political Candidates from Debates as Long as Exclusion is Reasonable and Viewpoint-Neutral . . . . *Billy Berryhill* 391

THE JUDGE WILLIAM C. KEADY DISTINGUISHED LECTURE SERIES II

Presented by the Mississippi Humanities Council[*]

William Colbert Keady was born in Greenville, Mississippi, on April 2, 1913, the youngest child of Michael John Keady, an Irish immigrant, and Martha Mahala Augusta Mills, a descendent of a distinguished southern family. He attended Central School, where he met his future wife, Dorothy Clark Thompson. They became high school sweethearts and finished Greenville High School together in 1931, where he starred in debate, journalism, and tennis. In his senior year he shared the title for the state doubles tennis championship.

Ill health and subsequent deaths of both parents, the 1927 flood and the 1929 depression depleted the family's resources. With the aid of his siblings (Mary Augusta Keady, Kathleen Keady McCormick, Michael John Keady, Jr.), scholarships, and jobs, he completed college and law school at Washington University in St. Louis. In 1935 he and Dorothy married, and the following year he returned to the Greenville law firm of Percy and Farish, where he became an active member of the community. His son, William Colbert Keady, Jr., was born in 1937, and his daughter, Peggy Anne Keady, in 1941.

In 1940, Keady was elected to the Mississippi House of Representatives for three years. After a two-year term in the

---

[*] The Mississippi Humanities Council, funded by the National Endowment for the Humanities, promotes public programs which interlock ideas and knowledge, curiosity and intellectual inquiry in assessing the human condition. The Judge William C. Keady Distinguished Lecture Series was inaugurated to explore the impact of judicial decisions on citizens' everyday lives.

State Senate, he left politics to return to the law firm, later known as Farish, Keady and Campbell and afterwards Keady, Campbell & DeLong. He engaged in full-time practice of law until April, 1968, when President Lyndon B. Johnson appointed him [to] the Federal Court for the Northern District of Mississippi. During his twenty-one year tenure on the bench, he was generally regarded as one of the top Federal judges; his record on reversals was among the lowest in the nation. Among his landmark—and controversial—decisions were his rulings that favored desegregation of public schools, that forced the state to improve its deteriorating prisons, especially the Mississippi State Penitentiary in Parchman, and that blocked construction of the Tennessee-Tombigbee Waterway.

Known as a feverish worker, he remained an active jurist throughout his life. His autobiography, *All Rise: Memoirs of a Mississippi [Federal] Judge*, was published in 1988. Judge Keady became ill in May of 1989 and died on June 16 of that year at the age of 76. The portrait (opposite page) by artist Marshall Bouldin, III, depicts the judge as he appeared in the courtroom—unforgettable, robed in dignified thunder, larger than life—a life now niched in the annals of law, justice, civil rights and Southern history.

Mary McCormick Sferruzza, Niece of Judge Keady

JUDGE WILLIAM C. KEADY AND THE BILL OF RIGHTS

Justice James Lawton Robertson[**]

December 15, 1991—a few weeks hence—will mark the 200th birthday of a great symbolic moment in the struggle for human freedom. On December 15, 1791, Virginia formally ratified the first ten amendments to the Constitution of the United States, becoming the eleventh state to do so, and at that moment the Bill of Rights became law. These ten amendments had ceased to be a litany of noble ideals, a string of stirring exhortations, and had become legally enforceable rights.

We venerate the document we know as the Bill of Rights. We rank it with the Declaration of Independence and the original Constitution as cornerstones of our country. We stand silent, in awe, with lumps in our throats, when we view it at the National Archives. Still, in this bicentennial year we have been reminded of its imperfections—in origin, history, handling, and content. It may well be that George Mason and Elbridge Gerry and the others who, in the late summer of 1787, complained that the new constitution lacked a bill of rights, pursued a political ploy seeking not to secure Americans from federal interference with then-believed-to-be natural rights but to defeat the new constitution altogether. It may be that James Madison never quite worked out how to fit a scheme of individual rights into a majoritarian democracy, so that majoritarian will and individual claim of right were from the beginning destined to clash angrily, at times violently, in each generation, then, now, and forever. Sentiment abounds of late that the nation cannot afford every citizen's full enjoyment of every right the Constitution affords. And so it may be that the living Bill of Rights will (have to) be amended from time to time—as it has been in the past— and that it will (have to) be reinterpreted from time to time as our country changes and as competing interests emerge—and that how and when we should amend and reinterpret will be matters upon which people of good will may sharply dispute. Still, what happened here two hundred years ago is worth remembering, and so are those who made it happen.

[**] Lecture II, Nov. 8, 1991.

Two hundred years ago, many took for granted that there was a natural law. Talk of natural rights was in the air. The eighteenth century had written its great triumph in moral and political philosophy, and the works of Locke, Montesquieu, and Rousseau made it easy for Jefferson to find acceptance for his majestic declaration: We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, and that among these are life, liberty, and the pursuit of happiness." It was commonplace for each person to think of himself—and others—as unique beings, possessed of dignity and worth, as free moral agents enjoying the divine and secular rights to define and pursue their own life plans, their own salvation, though their grasp fell short of their reach as ours does now.

Several of the original states adopted declarations of rights preceding their constitutions, naively assuming that not even a constitution could alter them. Some thought enumeration fraught with danger, lest important natural rights be disparaged by reason of their omission. In a very real sense, others thought of a bill of rights as merely satisfying some constitutional statute of frauds. More practical men thought our rights providential in source and permanent in time. Only a due regard for the lessons of history suggested we write them down, lest the government later forget.

Even then we saw this ideal of the sovereign individual, an ideal that had inspired revolutions and brought down despots, caught in the dilemma—the Madisonian dilemma, if you will—of how we handle the tensions between individual rights and majoritarian rule. We were then—though more so now—a pluralistic society, a nation of immigrants, culturally diverse by race, sex, religion, ethnicity, interest, ability, and socioeconomic circumstance, caught up in that ultimate circumstance of justice; that we bump into each other. We have not yet, as we had not then, transcended the ambiguities of life, recognizing that each of us is possessed of a free will capable of reason and judgment, accountable for our faults, while at the same time realizing that much in our lives is determined by our environment and genes. We demand liberty and we demand equality, yet so often do not see that we must sacrifice substantial degrees of the one to have the other. We insist on the right to be individuals, the right to be let alone, the right to march to the beat of a different drummer. If we wish, at least so long as we inflict no substantial harm on others. Yet at the same time we crave community and the power to enforce our majoritarian values. We who live with and have always lived with the tensions these ambiguities generate are those whom the Bill of Rights serves and shields. It is the challenge of our Bill of Rights, indeed, of all law, that it accommodate and take heed of the realities of the phenomena it seeks to regulate—hopes, fears, dreams, and faults, the behavior of people—the ambiguities of life, from which no law may extract us.

Our Bill of Rights cannot exist without persons. Amidst the clashing imperatives of majoritarian democracy and our federal system, this bicentennial anniversary of the document's ratification charges anew that we be clear what we mean by a legal right. We talk of property rights, of contract rights, of human rights—but are seldom clear to ourselves, much less to others, what we mean (other than that we want our own way). There is no talismanic prescription, yet I would offer that rights at their core derive from valid rules of law that give individuals zones of unchecked discretionary action that others, whether private citizens or governmental authorities, may not invade. Rights are legally enforceable entitlements an individual may claim. Rights may be claimed no matter how inconvenient society or its members may deem them. That they may be so claimed is what defines them as rights. They are, if you will, the individual's protection against the power of the state, against the majority's momentary madness. Such rights at their best are what give meaning to certain articles of American faith: that each human being is unique, that by virtue of his or her humanity he or she possesses an unalienable and undeniable dignity and worth, that he or she is entitled to the maximum basic personal liberty consistent with like liberty for each other individual. This, at any rate, is how I think of the rights in the Bill of Rights.

Law is not an end in itself, but a means to the end of a society in which we should all want to live. Any law—and, in our context any provision in the Constitution—that by its terms confers upon the people of this land such zones of unchecked discretionary action is properly a part of the Bill of Rights. Any rule of law that has the power to enhance each person's opportunity to experience uniqueness, to wrestle with the ambiguities of life, and to pursue an individual plan of salvation, is a part of the real Bill of Rights, today's Bill of Rights. The Bill of Rights is not just something that happened two hundred years ago. It is not just a charter of (then reasonably uncontroversial) human rights that safely summed up a struggle against arbitrary governmental power dating back at least to the Magna Carta. The Bill of Rights is not something that is; rather, it is a continuous process of becoming.

And so I think of the Bill of Rights as more than the first ten amendments to the Constitution. For one thing, it is not clear the Tenth Amendment expresses a human right at all, despite the reverence with which some in this state have at times regarded it. The Third Amendment has become an anachronism. Several rights guarantees made their way into the original constitution, such as the writ of habeas corpus and the bans upon ex post facto laws, bills of attainder, and impairment of the obligations of contract. The original federal Constitution protects the right to trial by jury in criminal cases. There is some truth to the claim that the amendments Madison drew in 1789 were safe, were likely to pass and be ratified with little controversy, in part because the new Congress would probably be concerned with more immediate matters, like how to raise revenues to fund the federal budget, with little time to contemplate or debate eternal issues. Still, the several state ratifying conventions had seen repeated clamors for a bill of rights. Massachusetts, New York, Virginia, and others had coupled their ratification with a strong demand that a bill of rights be added to the new federal constitution. And Madison had given his word. By June of 1790, nine states had ratified the Bill of Rights. Vermont was admitted to the Union and ratified on November 3, 1791, setting the stage for Virginia, the first of all of the states to proclaim its Declaration of Rights, to supply the necessary eleventh state vote ten days before Christmas, 1791.

History taught that important omissions remained, and so the Thirteenth Amendment banned slavery; the Fourteenth introduced the all-important idea of equality; and almost half of the twelve amendments adopted since then have addressed the right to vote, securing that right to black persons, women, and the young. Still the Bill of Rights so constituted remains imperfect. Its grand declarations of right are often open textured to the point of abstraction. Many of these rights have to be fleshed out in legislation. The Bill of Rights by definition is the imperfect expression of the ideal of personal liberty in the civil state and in this sense is no different from other laws.

Each generation has been charged to win anew the rights secured in the Constitution and sometimes to breathe new life into those rights. In different decades and parts of the country, the battle over particular rights seems for a time to take precedence over others. Our greatest such battle was that for human freedom fought a century and a quarter ago and won so terribly on the battlefield instead of in the assembly hall or courtroom. In the early decades of this century, the nation was riveted by the struggle for economic rights and security and, as well, by the "Red Scare" induced threat to liberty of conscience and freedom of expression. Today we contend over bodily self-determination, zones of privacy, environment versus enterprise, equality of opportunity versus of equality of result, victims' rights, and political correctness.

On April 26, 1968, William Colbert Keady ascended the federal district bench in North Mississippi and quickly found himself in the midst of two great and by no means unrelated battles for human rights. The struggle for enhanced human dignity was labeled the struggle for civil rights, for racial justice, and its most prominent battlegrounds were the schoolhouse and the voting booth. Concern for human dignity was similarly at the core of our increasing sensitivity to the plight of the criminally accused, both before and after conviction. More locally, though confrontation and court orders had begun to crack the conscience of the closed Mississippi society in that day, efforts to stifle political curiosity and debate, to still dissent, creative thought, and expression, and to punish those who would be different burdened greatly the rights secured by the First Amendment.

Between 1968 and 1983 and thereafter, Judge Keady had almost daily occasion to serve the living Bill of Rights, which was only one part of the Constitution he was sworn to defend. On their own turf those rights seldom defined themselves, seldom appeared in hard-edged case decider form. Though within each there seemed a core of certainty, his cases often lay on a penumbra of doubt, on the periphery, the cutting edge, as he faced claims and defenses pressed fervently by persons mired in the ambiguities of life and baser prejudices.

We are all too familiar with the imperatives of judicial interpretation in the court of last resort. We think of the Supreme Court's teachings; that the right to equal protection of the laws means black persons are denied equal protection when they are forced to attend segregated public schools; that freedom of speech means freedom for the thought that we hate and must be protected save the danger be substantial, clear and present; that the right to the assistance of counsel means that a criminally accused indigent citizen has the right to competent counsel at the state's expense at each critical stage of the proceedings against him. We number among the nation's heroes such defenders of those rights as John Marshall, Oliver Wendell Holmes, Jr., Louis D. Brandeis, Benjamin Cardozo, and Earl Warren, to name but a few.

Less understood is the role of the United States District Judge. in a very real sense, a judge at this level is the sergeant carrying out orders, those emanating from the Congress from the Supreme Court, from the court of appeals of his circuit. Ideally he or she is the model Lockean independent judge, fearlessly enforcing the law emanating from a democratically structured and responsive government. But the district judge is more than that. The government moves through the judge's hand as it acts upon its citizens, and he or she is charged to move that hand as the law requires. This official is responsible to act consistently with the declared rule of the positive law, is challenged to take the paper abstractions every school child learns and make them real as people experience and enjoy and thrive upon those rights. The district judge has the job of shaping each judgment about the rights of real people and seeding it with the potential for uplifting the spirit. This is the judge citizens see, the judge before whom plaintiff and defendant try their cases, the judge who looks the convicted in the eye while passing sentence, who looks into the faces of people who come before the court and must reach decisions, knowing that law and its processes at their very best yield but a crude approximation of justice.

There are times when the judge's course is well charted, when precedent seems settled or the statute clear. There are other days when some private attorney presents a new claim and the district judge experiences in the depth of his or her being the truth that, though the law is filled with reason and principle and grand generalities, he or she must choose, with no book of wisdom nor gun to the head compelling a particular choice. There are times when the district judge cannot pronounce judgment and in candor say, "The law made me do it," when he is not sure that his head will not be chopped off by the court of appeals or the Supreme Court.

There is a deeper dimension. The position of United States District Judge is unique and pivotal in its power to promote or prevent human enjoyment of individual rights. The process is inherently manipulable by a district judge with a particular bent of mind. The Supreme Court could declare in 1954 that separate but equal schools are inherently unequal, but a generation of black students thereafter endured racially segregated public education, mostly because of foot-dragging federal district judges.

Every lawyer knows that there are a dozen ways a trial judge hostile to a case can make the litigant's life miserable and leave the victory, even if won, a hollow one. An unsympathetic trial judge can grant unreasonable continuances. He can delay justice and thus deny it. A district judge can thwart a plaintiff's claim with pretrial rulings on standing to sue and class certification, on abstention, and on exhaustion of state remedies. The legal process abounds with procedural niceties. The judge can block the plaintiff's discovery in a dozen ways. She or he enjoys enormous discretion in admitting or rejecting trial evidence—which can make or break a case. Findings of fact in the setting of the burden of proof form a particularly fertile field for judicial maneuvering. The trial judge can manipulate balancing tests, find dubious waivers of rights, exalt form over substance. With temporary restraining orders and preliminary injunctions, he can make hash of the First Amendment. And even when rights violations are found, timidity in granting relief—in the name of federalism, equitable discretion, or judicial restraint—can make it all meaningless. Beyond these sub rosa forms of judicial discretion, the trial judge can blatantly deny a claim, leaving the losing litigant no alternative but to endure the time and trouble and expense of an appeal. A district judge who wants to can turn the process into a Kafkaesque nightmare. A review—in this setting—of the judicial career of Judge William C. Keady, though but one dimension of the man's work, cannot but ennoble the student and those who would follow after. A comparison of behavior on the district bench in the Northern and Southern Districts of Mississippi in the 1960s and 1970s abundantly makes the point.

School desegregation cases tested the mettle of the man as no others. When Judge Keady ascended the bench, fourteen years had passed since *Brown*, and, though many important judicial utterances had been forthcoming, the overwhelming majority of black children in the South had seen not a glimpse of desegregated public education. A month later, on May 27, 1968, the Supreme Court decided *Green v. New Kent County*

School Board and sounded the death knell for "freedom of choice" desegregation plans. The high court had held equal protection rights were at intolerable risk so long as racially identifiable schools remained.

Judge Keady's first few desegregation decisions disclose to me no hint that he sought to evade *Green*, much less *Brown*. Racially segregated schools had to end. The right to equality of educational opportunity is not a function of the color of a child's skin, and he knew it. What is clear is that Judge Keady had an almost Lincolnesque passion to preserve the public schools as the pivotal point of community life. In his memoir, *All Rise*, he explains that

> involvement of the federal court in a public school system was a delicate matter, and if drastic relief was ordered overnight, it would inevitably mean a lessening of local interest and pride of patrons in their public schools, and such loss of interest and pride by the white community would render it difficult, if not impossible, to pass bond issues to improve and continue an upgrade of the school's physical plant.[1]

Above all else, he feared "white flight," and out of that fear he sought to improvise to make desegregation as palatable as possible to whites. True, fourteen years had passed since *Brown*, but he should not be charged with that time. His watch began on April 26, 1968, and this former-school-board-member/brand-new-federal judge felt his charge was to enforce the Constitution and preserve the public schools. The Fifth Circuit did not see it his way and promptly reversed—in Marshall County, Indianola, and others. To his credit, Judge Keady thereafter accepted his role as federal foot soldier, and, within a few years, practically every school district in the Northern District of Mississippi was under federal court order.

Oftentimes, a court decree is not enough to ensure that a right may be enjoyed. Those enjoined seldom surrender strongly held views to a single court order. Such was the situation with court-ordered school desegregation, which soon moved to a phase of evade and avoid. An all-white private school system sprung up across Mississippi, almost overnight. Leaving aside an early bobble in *Norwood v. Harrison*,[2] the Tunica school textbook loan case, Judge Keady sensitively thwarted such tactics. In the same Tunica County, for example, upon the order for complete desegregation, an all-white racially segregated church school was formed. Many white teachers refused reassignment to desegregated classrooms. The school board proposed to pay these teachers for the remainder of the year. Judge Keady held that: "Regardless of what the school board may have intended, the effect of its voluntary decision to pay salary balances to all teachers refusing reassignment was to furnish material aid to continuing segregated education in Tunica County by means of a private school."[3] He enjoined the payments.

---

[1] WILLIAM COLBERT KEADY, ALL RISE: MEMOIRS OF A MISSISSIPPI FEDERAL JUDGE (1988).

There were many, many other cases to the effect.

I have no doubt Judge Keady found great satisfaction in *United States v. Corinth Municipal Separate School District*[4] when, eight years after entry of a desegregation order, he terminated the injunctive orders and dismissed the complaint. This action was based on a finding that the school district had achieved a unitary school system within the meaning and contemplation of the Constitution as the Supreme Court had read it. He concluded as follows: "Here, we believe that, as a federal court, we have no further constitutional function to perform in this school system."[5] But he added: "It seems hardly necessary, in closing this school desegregation case, to remind anyone that the doors of this federal district court remain open to redress grievances condemned by the Constitution and laws of the United States."[6]

Some of Judge Keady's most important work was in the voting rights area. He repeatedly recognized that the right to vote can be affected by dilution of voting power as well as by a blatant ban on casting a ballot.[7] A flood of early cases saw the Court ordering reapportionment in local electoral districts, primarily for county supervisors, to the end that each voter's ballot might have a power equal to all others. And when he erred he was a quick study on remand. In *Ferguson v. Williams*,[8] he spoke for a three-judge court rejecting a challenge to Mississippi's four-month registration requirement for voting in state and local general elections. The Supreme Court struck down a similar rule in Tennessee and vacated the *Ferguson* judgment. On remand, the three-judge court on which Judge Keady served confessed error and invalidated the Mississippi Requirement.[9]

---

[2] 563 F.2d 722 (5th Cir. 1977).

[3] United States v. Tunica County Sch. Dist., 323 F. Supp. 1019, 1025-26 (N.D. Miss. 1970), *aff'd*, 440 F.2d 377 (5th Cir. 1971).

[4] 414 F. Supp. 1336 (N.D. Miss. 1976).

[5] *Corinth Mun. Sch. Dist.*, 414 F. Supp. at 1346.

[6] *Id.*

James v. Humphreys County Board of Election Commissioners[10] was a case of consequence. How in practice persons unable to read and write might vote has always worried us. With the advent of substantial black voter registration, concern and conflict became acute. In the *Humphreys County* case, the black plaintiffs had argued that illiterate voters should receive assistance in voting on the same terms as blind and disabled voters—that a person of the voter's choosing might assist in casting the ballot. The state saw this plan fraught with dangers of voter manipulation, if not fraud, and strongly argued that illiterate voters were inherently susceptible to partisanship efforts. Judge Keady replied as follows:

> There is no evidentiary support for this view . . . [A]ny classification between physically disabled voters and illiterate voters, in terms of who may render assistance at the polls, rests upon unclear, if not dubious, reasoning. . . . Considerations of administrative convenience alone, however, reasonable they might be, are insufficient to "impinge upon the exercise of

---

[7] *See, e.g.*, Moore v. Leflore County Bd. of Election Comm'rs, 351 F. Supp. 848, 851 (N.D. Miss. 1971).

[8] 330 F. Supp. 1012 (N.D. Miss. 1971).

[9] Ferguson v. Williams, 343 F. Supp. 654, 656 (N.D. Miss. 1972), *vacated*, 405 U.S. 1036 (1972).

[10] 384 F. Supp. 114 (N.D. Miss. 1974).

> important constitutional rights. . . ."[11]

What is important is not that Judge Keady was right but that he said these things. He did not have to, for reasons mentioned earlier. And I do not think it unfair to suggest other Mississippi federal judges would not have said these things.

Voting rights cases proved particularly laden with tensions among competing rights and interests. Judge Keady's opinions perceptively balance these. For example, in *Moore v. Leflore County Board of Election Commissions*,[12] he wrote:

> The one-man, one-vote principle for making equal representation for equal number of people a fundamental goal may not be viewed in isolation and to the exclusion of other facets of the Equal Protection Clause of the Fourteenth Amendment, or of discrete constitutional provisions. Courts must require that consideration be given to the Constitution as a whole.[13]

And then, the Judge quoted the Supreme Court of the United States to the effect that "As no constitutional guarantees enjoys preference, so none should suffer subordination or deletion."[14]

Judge Keady made these remarks in the context of a supervisor's redistricting case in Greenwood. The board had submitted a plan satisfying the one-man, one-vote principle in the sense that roughly twenty percent of the population was assigned to each of the new districts. Judge Keady found, on the other hand, that

> Since it is evident that both the purpose and effect of the board's plan was to divide the black population and dilute the black vote in Leflore County, the plan must be rejected for that reason alone. Indeed, it would be difficult to visualize a clearer case of racial gerrymandering with the result of invidious discrimination than obtains in the instant case.[15]

---

[11] *James*, 384 F. Supp. at 132 (quoting *Ferguson*, 343 F. Supp. at 656).

[12] 361 F. Supp. 603 (N.D. Miss. 1972).

[13] *Moore*, 361 F. Supp. at 607 (citations omitted).

[14] *Id.* (quoting Ullman v. United States, 350 U.S. 422, 428 (1956)).

[15] *Id.*

He followed with an expression that would surely generate controversy today, if it did not then.

> [T]his Court does not place its imprimatur upon concentrating blacks within one or more districts to emphasize their voting strength, but only, that the race of people cannot be considered in reapportionment. "The federal constitution is color blind. It is equally as unconstitutional to discriminate against a white man as it is to discriminate against a colored man."[16]

In *Dotson v. City of Indianola*,[17] Judge Keady, speaking for a three-judge court, acted vigorously to enforce the preclearance requirement of the Voting Rights Act to annexations in the City of Indianola. This action set in motion the process which has led today to single-member wards and far greater black participation in municipal affairs of that community than had ever been known before. In *Dotson*, as ever, Judge Keady's eye was on substantive results, cutting through a variety of procedural barriers the city had invoked. His decisions presented a powerful appeal for fairness toward all, toward the ideal that all affected persons within a community might enjoy the right to vote and to have their votes count for something.

In the late 1960s and the decade that followed, there was a second substantive front of passion and action within the country and North Mississippi in particular. I speak of the concern for fairness in process to those criminally accused. Judge Keady had a unique ability to make the ideal of a fair trial an experiential reality. A former law clerk and federal prosecutor once told me Judge Keady always "gave the defendant a running head start."

Phillips v. Cole[18] was an important early decision in the criminal constitutional field. A class action had been brought to enjoin the state from trying indigent juveniles on charges of delinquency and for misdemeanors without first advising them of their right to counsel and without appointing counsel, should there be no waiver. The practical problem was that state law provided no method of employing and compensating court-appointed counsel in other than felony cases. Judge Keady held that Supreme Court precedent regarding the right to counsel required that the injunction be granted. En route he gave one of his strongest affirmations of the primacy of individual rights.

---

[16] *Id.* (quoting Dixon v. Duncan, 218 F. Supp. 157, 160 (E.D. Va. 1963)).

[17] 514 F. Supp. 397 (N.D. Miss. 1981), 521 F. Supp. 934 (N.D. Miss. 1981).

[18] 298 F. Supp. 1049 (N.D. Miss. 1968).

> [C]onstitutional rights must be recognized and upheld, regardless of consequences. This Court recognizes that the lack of hiring authority may cause real concern as well as undoubted confusion, to State law enforcement officers and State judges. It is fair to observe that if there is a dilemma which here results, it is not caused by recognition of Sixth Amendment rights. . . . Any legal vacuum resulting in the state criminal proceedings is a situation for which responsibility cannot be laid at the door of this Court. The State of Mississippi, in undertaking to define crime and prosecution thereof, must, at all events, comply with the demands of the Constitution of the United States. Inaction, or failure to act in passing necessary legislation to meet this problem, will not militate against the maintenance of the constitutional right. In those terms, continued local inertia will be the root cause of bringing to a grinding halt prosecutions of misdemeanors and like offenses because of procedural constitutional infirmity. The practical effects of the holding today cannot become a matter of concern, for my obligation is to uphold the United States Constitution.[19]

Judge Keady often told his law clerks he never thought of himself as an "ideological liberal. I just believe in the Constitution, and to some people that makes me a liberal."

The writ of habeas corpus is a procedural means of asserting a right ranked first in the Anglo-American world. It is our oldest civil right, calling to mind the case of Edward Bushel, foreman of the jury that refused to conflict William Penn, a story we all learned in school. It enables one in custody to demand of his captors proof of their legal right to hold him.

---

[19] *Phillips*, 298 F. Supp. at 1053.

According to Holmes, "*habeas corpus* cuts through all forms and goes to the very issue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[20] Judge Keady's habeas corpus judgments make real Holmes's pointed platitudes, in sharp contrast with the grudging allowance of the writ in today's federal courts.

King v. Cook,[21] is representative. A state prisoner charged that black persons had been systematically excluded from service on the Quitman County jury that had convicted him. The evidence showed that fifty-six percent of the jury-eligible population in Quitman County was black while forty-four percent was white. Notwithstanding, the jury list over the relevant five-year period was 4.6 percent black and 95.4 percent white. Judge Keady allowed the use of statistical proof to establish the systematic exclusion claim. He recognized the by then uncontroversial claim that a conviction could not stand if based on an indictment of a grand jury or the verdict of a petit jury from which black persons were excluded because of their race. Mississippi law required that the jury list be drawn from voter registration rolls, and Judge Keady found that all legal and administrative impediments to voter registration by black persons had been removed by the time of King's trial. Notwithstanding, Judge Keady found the form little more than an empty shell, saying, "[T]he fear of reprisal at the hands of the white community, be it unfounded, was still present in the minds of a substantial segment of the Quitman County Negro population."[22] Confronting the state's claim that Mississippi law prohibited the board from preparing jury lists from any source other than the voter registration rolls, Judge Keady held King's rights overriding, concluding that, "the trial court, confronted with the facts presented by petition on motion to quash his indictment, should have granted the motion and summoned a common-law jury from the body of the district."[23]

---

[20] Frank v. Mangum, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting).

[21] 298 F. Supp. 584 (N.D. Miss. 1969).

[22] *King*, 298 F. Supp. at 588.

Another important case in which Judge Keady saw a liberal and practical role for writ of habeas corpus, and thereafter vindicated a state prisoner's claim that black persons had been systematically excluded from the grand jury which indicted him, was *Ford v. Hollowell*,[24] arising out of Calhoun County. First, the state had argued that the petitioner had not exhausted his state remedies when he sought to produce new evidence to the federal court. Judge Keady rejected that argument, saying that, "[T]he availability of additional evidence, as contradistinguished from the raising of new constitutional issues, does not defeat an otherwise valid claim that state remedies have been exhausted."[25] In the end, Judge Keady went to the heart of the matter:

> It is not necessary, however, to a finding of discrimination that the officials acted without good faith, for objective results largely govern in judging the constitutionality of jury selection methods. Whatever the jury selection plan, whatever the intent with which it is implemented or executed, if it results in a long-continued exclusion or dramatic underrepresentation of blacks on the jury lists, it is constitutionally infirm.[26]

Judge Keady held that county officials had a duty to achieve a jury list in which there was a fair cross-section of the population suitable for jury duty, and he held that "To fulfill that duty, they—the board of supervisors and the circuit judge—were obligated to use every means legally available."[27]

In *Gann v. Smith*,[28] Judge Keady followed Holmes's view of habeas corpus as he protected Fourth Amendment-secured privacy rights. Melvin Evans Gann had been prosecuted in Chickasaw County for illegal possession of beer. On August 31, 1968, ABC agents, armed with a search warrant, appeared at

---

[23] *Id.*

[24] 385 F. Supp. 1392 (N.D. Miss. 1974).

[25] *Ford*, 385 F. Supp. at 1397.

[26] *Id.* at 1399-1400.

[27] *Id.* at 1400.

[28] 318 F. Supp. 409 (N.D. Miss. 1970), *appeal dismissed*, 443 F.2d 352 (1971).

Gann's residence and from without announced their presence and purpose at front and back door. Hearing no reply, one of the agents kicked in the front door and entered the house, saw Gann emerge from the bathroom, and served him with a search warrant. He thereupon seized 102 sixteen-ounce cans of assorted brand of beer. Gann was convicted in Justice of the Peace court and fined $500.00. On appeal to the circuit court, after trial *de novo*, he was convicted again and sentenced to a $500 fine and ninety days in jail, with sixty to be "held up pending good behavior." The Supreme Court of Mississippi affirmed, and Gann sought relief in the federal courts via habeas corpus, challenging the legality of the search of his home wherein had been found the beer he was convicted of possessing. Judge Keady granted relief. His opinion is important in three respects. First, he showed none of the grudging reluctance today so prevalent to consider a state prisoner's claim of constitutional violations via federal habeas corpus. Because Gann had appealed to the Supreme Court of Mississippi and had lost, Judge Keady held that he had exhausted his state remedies.[29] Second, the state argued that Gann had not made the proper procedural objections to the introduction of the beer and was barred under the contemporaneous objection rule. In truth and in fact, Gann's procedural objection had not been textbook perfect, but he had twice in the trial proceedings objected to the introduction of the beer:

> Although he failed to state that he objected to the affidavit and warrant on Fourth Amendment grounds, and failed to object at all to the officers' testimony based thereon, there is nothing in the record indicating any intention to waive the right to object on those grounds.[30]

Judge Keady showed a strong preference for considering claims of rights violations on their merit rather than, as is so often the case today, searching for a way to hold the point procedurally barred, a ruse disingenuously labeled independent and adequate state ground.[31]

---

[29] *Gann*, 318 F. Supp. at 411.

[30] *Id.* at 413.

Finally, on the merits, Judge Keady read the Fourth Amendment as though it really did require that search warrants should not be issued except upon probably cause.[32] He examined the affidavit presented to the Justice of the Peace who issued the warrant and the other evidence in the case, and, in a very sensitive opinion, found that it was simply based on speculation and conjecture, not rising to the dignity of "probable cause" sufficient to invade a person's normal expectation of privacy in his own home.[33]

Even in cases where he denied substantive release, Judge Keady consistently treated claims of breach of right with seriousness, eschewing the restrictive approach to habeas corpus so often urged today and, as well, the procedural bar. The bottom line for Judge Keady seemed to be summed up in a statement he made in *Wright v. Edwards*.[34] "The state adjudication carries the weight which the federal practice gives to decisions of the court of last resort of another jurisdiction, but the issues raised being federal, it is the federal court which must have the last say."[35]

United States v. King,[36] was another important Fourth Amendment case. Federal prosecutors brought charges against five defendants for conspiring to violate federal liquor laws, illegally possessing non-tax paid-whiskey, and illegally fermenting mash fit for distillation.[37] Judge Keady held that the report of an anonymous informant regarding a still, though corroborated by the odor of mash coming from the barn, was not sufficient to support warrantless arrests of these men.[38] As it turned out, the still was not in operation and had not been connected, the still "cooker" itself contained no mash, the only mash inside the barn was fermented rye left in the bottom of fifty-five gallon barrels, and liquid had already been skimmed off the top of the mixture, leaving only a slightly moist rye.[39] This opinion again reveals Judge Keady's strong preference that the warrant requirement of the Fourth Amendment be taken seriously and that officers not be permitted to avoid that requirement and otherwise invade the privacy and property of citizens absent probable cause, as distinguished from mere suspicion.

---

[31] *Id.* at 413-14.

[32] *Id.*

[33] *Id.* at 415.

[34] 343 F. Supp. 792 (N.D. Miss. 1972).

[35] *Wright*, 343 F. Supp. at 798.

[36] 305 F. Supp. 630 (N.D. Miss. 1969).

[37] *King*, 305 F. Supp. at 631.

[38] *Id.* at 633.

In *United States v. Greer*,[40] Judge Keady took seriously Fourth Amendment rights, particularly warrant and probable cause components, in yet another context. In Greer he wrote that "an automobile has the status of a house, so far as the protection of the Fourth Amendment is concerned, subject to certain limitations arising from its mobility.[41]

One of Judge Keady's most important and most politically charged habeas corpus cases was *Henry v. Williams*.[42] This case concerned Aaron E. Henry, longtime president of the state NAACP, and arises out of the familiar "hitchhiking" incident in 1962.[43] Henry had been convicted of disturbing the peace by making indecent advances to a hitchhiker and had been sentenced to serve sixty days in jail and pay a fine of $250.00.[44] The evidence was abundant then and now that prosecution was motivated by a desire to disable Henry, one of the most effective black civil rights leaders in Mississippi at the time. In the federal habeas proceedings, prosecution threw up the familiar procedural objections: lack of federal habeas power, failure to exhaust state remedies, independent and adequate state grounds,, procedural bars, and the like.[45] Judge Keady quickly saw that these procedural objections were at best a ruse and that "The duty devolves upon this court, in the exercise of its

---

[39] *Id.*

[40] 297 F. Supp. 1265 (N.D. Miss. 1969).

[41] *Greer*, 297 F. Supp. at 1267.

[42] 299 F. Supp. 36 (N.D. Miss. 1969).

[43] *Henry*, 299 F. Supp. at 39.

[44] *Id.* at 41.

[45] *Id.* at 43-47.

Great Writ jurisdiction, to examine the basic question of whether that detention offends the Constitution and laws of the United States, notwithstanding the judgment of state courts."[46] The opinion goes on to examine sensitively Fourth Amendment questions regarding search of Henry's automobile and held Henry's Fourth Amendment rights had been violated.[47] On the state's waiver claim, Keady arguably manipulated the burden of proof opposite the way he might have, holding that as "the state having failed to overcome the presumption against waiver of petitioner's Fourth Amendment rights against unlawful search and seizure, this court can only view petitioner's detention as offensive to the Constitution. . . ."[48]

At his state court trial, Henry had been represented by Robert J. Carter and Jawn A. Sandifer of New York and R. Jess Brown, then of Vicksburg.[49] Judge Keady showed sensitivity to the climate at the times by a description of the county courtroom in Clarksdale on March 21, 1962, and concluded that "[T]he weather was extremely warm that day and, although pitchers of ice water and cups were placed on the judge's bench and on the state's table, none was provided for the defense. Defense counsel were told, however, that they might use a "for colored only" fountain located outside the courtroom."[50]

Toward the end of his judicial career, and before the Supreme Court began slamming shut the state prisoner's habeas corpus door to the federal court, Judge Keady heard several final pleas by Mississippi death row inmates. Again, the now passe Holmes view of habeas undergirds the Keady approach.

In the Jimmy Voyles case,[51] Judge Keady found that court-appointed defense counsel had been guilty of substantial failures to investigate the evidence, to interview potential witnesses, to adequately cross-examine prosecution witnesses, and to request important assistance of counsel.[52] The court vacated Voyles's conviction and sentence.[53]

---

[46] *Id.* at 44.
[47] *Id.* at 44-45.
[48] *Id.* at 50.
[49] *Id.* at 41.
[50] *Id.*
[51] Voyles v. Watkins, 489 F. Supp. 901 (N.D. Miss. 1980).

In *Irving v. Hargett*,[54] the court reviewed the state capital murder conviction and death sentence imposed on John Buford Irving, III.[55] The right to counsel issue was central. What happened was that Irving and another had been jointly charged and were represented by the same lawyers.[56] The position of the two defendants diverged at trial and particularly on the question of sentencing phase strategy.[57] Conflict-of-interest laden defense counsel prevented Irving from taking the stand and pleading for his life at the sentencing phase.[58] Judge Keady found that defense counsel acted with substantially conflicting loyalties to Irving and his co-defendant, Givhan, and that, but for their concern for Givhan, counsel would have permitted Irving to testify at his sentencing.[59] Judge Keady severely censured counsel for not recognizing their conflict of interest and for not reporting this conflict to the trial court.[60] He held, nevertheless, that the conflict of interest precluded Irving's enjoying effective assistance of counsel as guaranteed in the Constitution.[61] The point again, is that this result was not foreordained, and that other, less sensitive federal judges might have found the facts otherwise, if not crediting one of the state's jurisdictional or procedural defenses.

There is a little legislative history behind the Eighth Amendment's command that "cruel and unusual punishments [shall not be]inflicted." The amendment was taken verbatim from Article X of the English Bill of Rights of 1689. It was adopted in the Congress in 1789 and submitted to the states for ratification with no discernible debate or explanation. Many accepted that the amendment has no fixed or settled meaning, but historically has "draw[n] its meaning from the evolving standards of decency that mark the progress of a maturing society."[62]

---

[52] *Voyles*, 489 F. Supp. at 909-12.

[53] *Id.* at 912.

[54] 518 F. Supp. 1127 (N.D. Miss. 1981)

[55] *Irving*, 518 F. Supp. at 1129.

[56] *Id.* at 1140.

[57] *Id.* at 1143-44.

[58] *Id.* at 1142.

[59] *Id.* at 1143-45.

[60] *Id.* at 1145-46

[61] *Id.*

On September 13, 1972, Judge Keady announced that he had before the Court a

> case of great public concern and interest [that] involves alleged unconstitutional conditions and practices in the maintenance, operation and administration of the Mississippi State Penitentiary at Parchman, Mississippi.[63]

Judge Keady reported that had sifted through volumes of testimony and documentary and photographic exhibits and had visited Parchman. He found that:

> The housing units at Parchman are unfit for human habitation under any modern concept of decency. The facilities at all camps for the disposal of human and other waste are shockingly inadequate and present an immediate health hazard. Open sewage is a breeding ground for rats and other vermin. By any standard of decency, the physical facilities are woefully inadequate and far below minimal requirements. . . . Many of these gross deficiencies are of long standing and are the result of public and official apathy and neglect for the fundamental needs of persons incarcerated for crime. . . . The living conditions provided for the inmates at the various camps are generally deplorable and subhuman.
>
> The evidence is replete with instances of inhumanities, illegal conduct and other indignities visited by inmates who exercise authority over their fellow prisoners. . . . Inmates have, on many occasions, suffered injuries and abuses as result of the failure to select, train, supervise and maintain an adequate custodial staff. Trusties have abused their position to engage in loan sharking, extortion and other illegal conduct in dealing with inmates subject to their authority and control.[64]

---

[62] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[63] Gates v. Collier, 349 F. Supp. 881, 885 (N.D. Miss. 1972), *aff'd* 525 F.2d 965 (5th Cir. 1976).

[64] *Gates*, 349 F. Supp. at 887-89.

For page after page, the opinion continues reciting Parchman's inhuman conditions and inmate-on-inmate violence of every imaginable primitive description.

Judge Keady's great achievement in *Gates*, however, was not his ability to find the facts. The facts were there for those who would see. What was novel in 1972 was the notion that a federal court had anything to say about the matter. For years courts everywhere had followed "hands-off" policy toward prison conditions. Political neglect was a fact of life—convicted felons have been universally unpopular and they cannot vote. Federalism concerns loomed large in that a federal court had been asked to intervene in matters of state legislative and administrative policy, and in a way certain to affect the state's purse. Nor was there reason to think federal district judges particularly adept in penology or prison administration.

Judge Keady began his conclusions of law with the accepted premise that the Eighth Amendment was enforceable against the State of Mississippi through the due process clause of the Fourteenth Amendment.[65] He then acknowledged that the amendment's ban on cruel and unusual punishment had no fixed meaning.[66] His tour de force was his statement that

> The prohibition of the Eighth Amendment is not limited to specific acts directed at selected individuals but is equally applicable to general conditions of confinement that may prevail at a prison. While confinement, even at hard labor and without compensation, is not necessarily cruel and unusual punishment, it may be so when the conditions and practices become so bad as to be shocking to the conscience of reasonably civilized people. . . .[67]

That he may have enjoyed many rights secured in the Bill of Rights en route to Parchman did not mean all others were stripped from the prisoner's soul at the jailhouse door. And so, drawing what comfort he could from tentative federal steps in Arkansas and Virginia—all that existed of federal-court-mandated prison reform at the time—Judge Keady found that a broad range of conditions at Parchman constituted cruel and unusual punishments and invaded rights secured to the inmate plaintiffs by the Eighth and Fourteenth Amendments.[68] Thus began a decade-long odyssey toward prison reform in Mississippi which must stand as the Judge's greatest achievement in practical realization of a right abstract in its nature, open textured in its language, and unrealized in the world for at least 185 years after it became law. The *Gates* opinion—and Judge Keady's shepherding of its implementation—are all the more remarkable when seen in the light of the Supreme Court's recent expressions in the field, *Wilson v. Seiter* (1991)[69] and *Rhodes v. Chapman* (1981),[70] which are so different in tone and substance and regard for human dignity.

---

[65] *Id.* at 893 (citing Robinson v. California, 370 U.S. 660, 667 (1962)).

[66] *Id.*

[67] *Id.* at 893 (quoting Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971)).

Stevenson v. Reed[71] was in a way a spinoff from *Gates*. Judge Keady was faced with a claim by prison inmates of the right to an adequate law library and state-supplied legal counsel.[72] Recognizing that persons incarcerated in the penitentiary had been finally convicted, he found correctly no Sixth Amendment right to further counsel.[73] On the other hand, he accepted the view that the prisoner has access to the courts in post-conviction and other civil litigation and that the state may not place in the way of a putative inmate plaintiff physical impediments which may effectively prevent communications with the judiciary.[74] The Court denied the claim for right of access to legal counsel.[75] Instead, Judge Keady held that, where an adequate law library had been provided, the presence of inmate writ writers to assist inmates satisfied the due process right of reasonable access to the court.[76] He added that the state was charged with the responsibility for developing a system whereby inmate or free writ writers would be made available to prisoners needing assistance, subject to reasonable regulations.[77]

---

[68] *Id.* at 895.
[69] 501 U.S. 294 (1991).
[70] 452 U.S. 337 (1981).
[71] 391 F. Supp. 1375 (N.D. Miss. 1975), *aff'd* 530 F.2d 1207 (5th Cir. 1976).
[72] *Stevenson*, 391 F. Supp. at 1377.
[73] *Id.* at 1380.
[74] *Id.*
[75] *Id.* at 1381-82.

In *Scarborough v. Kellum*,[78] Judge Keady brought a characteristic touch of practicality to judicial recognition of a fundamental right. He recognized that incommunicado detention of an arrestee violated due process.[79] In one case, the accused was charged with driving while intoxicated and demanded that he be allowed to make a phone call.[80] The evidence reflected that the officers would not allow the arrested person to make a call, but offered to telephone anyone he might wish and give whatever instructions he might have.[81] Judge Keady recognized the arrestee's right of communication with the outside world, but held the distinction between the arrestee's direct communication and the surrogate offer of the officer was not of constitutional proportions.[82]

William C. Keady became Judge Keady just as major cracks began to appear in the wall around "The Closed Society." Decades earlier Holmes put his finger on why closed societies emerge and why in every generation we will need a First Amendment:

> Persecution for the expressions of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your pre-

---

[76] *Id.* at 1382-83.

[77] *Id.* at 1383.

[78] 386 F. Supp. 1360 (N.D. Miss. 1975), *aff'd* 525 F.2d 931 (5th Cir. 1976).

[79] *Scarborough*, 386 F. Supp. at 1374.

[80] *Id.* at 1363.

[81] *Id.*

[82] *Id.* at 1364.

mises.[83]

These insights, these truths are as old as civilized society. Out of these insights and out of their experiences, those who gave us this country sought above all else to secure what they saw as each person's natural right to liberty of conscience, to freedom of the written, the spoken, and the symbolic word.

And so the First Amendment has long been the brightest star in our constitutional firmament. It arises from our concern for individual liberty, our recognition that lives, like flowers, need sunlight and space to grow and flourish. Judge Keady's years on the federal district bench saw him often challenged to fashion legal remedies that afforded that sunlight and space.

In *Robinson v. Coopwood*[84] black citizens of Holly Springs had expressed their anguish and wrath over the assassination of Dr. Martin Luther King by numerous marches through the streets of that town.[85] There were rumors and evidence of violence and arson in the wake of which the city council adopted a special ordinance requiring marchers to give one hour advance notice of any proposed protest march to the city police and strictly limiting the number and manner of marches.[86] Judge Keady held the one hour notice provision unconstitutional as applied, explaining that "[T]he claims of the City of Holly Springs have not been lightly dismissed, but have rather been outweighed by the rights of the individual to voice dissatisfaction with his government, whenever he so desires, as long as he remains peaceful."[87] Characteristically, he balanced the interest and found individual liberty tipped the scales. Emphasizing the clear and present danger test, Keady stated that "Free speech may not be restricted on the mere possibility that some breach of the peace might occur at some time."[88] He continued:

---

[83] Abrams v. United States, 250 U.S. 616, 630 (1919).

[84] 292 F. Supp. 926 (N.D. Miss. 1968), *aff'd per curiam*, 415 F.2d 1377 (5th Cir. 1969).

[85] *Robinson*, 292 F. Supp. at 928.

[86] *Id.*

[87] *Id.* at 933.

[88] *Id.*

> The exercise of the rights of free speech and free assembly cannot be made a crime, nor may those who seek to freely exercise those rights be criminally punished for failure to previously register their intention with law enforcement officers, in absence of a situation involving clear and present violence or threat thereof. . . . In short, the administration of a dosage of "preventive medicine" is impermissible in connection with First Amendment rights. These rights are susceptible of restriction "only to prevent grave and immediate danger to [an interest] which the state may lawfully protect.[89]

In *Montgomery County Board of Education v. Shelton*,[90] the court had before it a controversy arising out of the then four-year-old effort to desegregate the public schools of Montgomery County. The court had entered an order for total desegregation in 1970. Disturbances erupted shortly thereafter and a number of black high school students made public expression of their grievances by picketing, marching, and otherwise engaging in protest demonstrators in the town of Kilmichael. The Chancery Court of Montgomery County entered an ex parte order enjoining the students. Judge Keady vacated the order, stating that "[F]ederal injunctive relief is available in the present suit because of the exceptional circumstances indicating great and immediate danger of irreparable injury to the students' constitutional rights which are sufficient to override the national policy against federal intervention in state proceedings embodied in Section 2283."[91] He continues further, "[T]he foregoing unique and special circumstances are factors sufficient under equitable principles to create a case of grave and irreparable injury to important public rights which we are required to protect by striking down the unconstitutional state injunction and enjoining its enforcement."[92]

In *Stacy v. Williams*,[93] Judge Keady, speaking for a three-judge federal court, confronted the Board of Trustees of Institutions of Higher Learning's notorious speaker ban. Recognizing the students' right to hear, more so than the speaker's right to speak, the court nevertheless held that there were different interests at stake which must be balanced: "The interests of both students and Board can, and must, yield to harmonious accommodation under the Constitution."[94]

---

[89] *Id.* at 934.

[90] 327 F. Supp. 811 (N.D. Miss. 1971).

[91] *Shelton*, 327 F. Supp. at 815-16.

[92] *Id.* at 819.

[93] 306 F. Supp. 963 (N.D. Miss. 1969).

Enforcing the clear and present danger test, the court struck down the regulation. What is important about *Stacy* is that it came as a late step in an ongoing process wherein the Board of Trustees had demonstrated persisting obstinacy in barring politically provocative speakers access to state campuses. In striking the regulation, as had been done before, the court could have stopped there. Instead, the court went further and drafted its own regulation, stating, arguably disingenuously, that it was "unwilling to strike down what it has done and leave the state's institutions of Higher Learning entirely without protection afforded by reasonable and valid rules."[95] The regulation then promulgated exists to this day.

Jordan v. Cagle[96] was one of Judge Keady's important First Amendment decisions. The school board had refused to rehire David Jordan, who was a black community leader and president of the Greenwood Voters League.[97] Factually, the case arose in the context of the 1978 senatorial elections. The Voters League had endorsed Charles Evers in his candidacy for the Senate. Historically, school teachers in Greenwood had been released from duties on election day to work at the polls. Though they were not released on this occasion, Jordan took the leave anyway.[98] As a result, the school board sought to justify its refusal to rehire him.[99] The court found that his failure to rehire was based on Jordan's criticism of the school superintendent.[100] Even though the court found Jordan's comments about the superintendent abrasive, they related to a matter of public concern, and there was no showing that he knew his statements were false or that he made them in a reckless manner or that there was an adverse effect upon his teaching duties.[101] In a careful opinion showing sensitivity to the realities to the situation, Judge Keady said he was "persuaded that the dominant motivation for the defendant's action was retaliation for the plaintiff's exercise of his first amendment right of free speech."[102] He ordered Jordan reinstated where he remains a teacher to this day.

---

[94] *Stacy*, 306 F. Supp. at 970.

[95] *Id.*

[96] 474 F. Supp. 1198 (N.D. Miss. 1979).

[97] *Jordan*, 474 F. Supp. at 1200.

[98] *Id.* at 1201 & nn.1-2.

[99] *Id.*

Robinson v. Stovall[103] arose out of confrontations between black persons and white persons in Okolona, Mississippi, in the Spring of 1979, the genesis of which was the United League's protest of discriminatory treatment black persons had received in the community. On April 14, 1979, the city had arrested and jailed 114 black persons for violating the city's parade ordinance.[104] The arrested persons went to federal court claiming that the city prosecutions would infringe their First Amendment rights to picket peacefully, demonstrate, and march within Okolona.[105] First, Judge Keady grated a temporary restraining order enjoining the city prosecution in the Okolona City Court.[106] This allowed time for tempers to cool and reason to surface. Judge Keady ultimately held, after a full hearing, that there was no substantial reason to doubt Plaintiffs' First Amendment rights would be vindicated through the state courts and that there was no credible showing that the state criminal proceedings were themselves instituted for the purpose of causing constitutional harm.[107] As a practical matter, settled federalism principles in the United Sates Supreme Court, and particularly in *Younger v. Harris*[108] pretty well mandated the result Judge Keady ultimately ordered. His practical handling of the matter, however, greatly enhanced the likelihood that the city's legitimate interest in prosecuting those who violate the ordinance would not be pursued in such a way as to chill the Plaintiffs' exercise of their First Amendment rights.

---

[100] *Id.*

[101] *Id.* at 1211.

[102] *Jordan*, 474 F. Supp. at 1215.

[103] 473 F. Supp. 135 (N.D. Miss. 1979).

[104] *Robinson*, 473 F. Supp. at 136.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 145-47.

A typical example of the difference between Judge Keady's attitude toward the Bill of Rights and attitudes prevalent in the Southern District of Mississippi concerns the motion picture, "The Fox." The movie concerns the relationship of two unmarried females and an unmarried male and presents a modest amount of nudity (though nothing remotely resembling that by which we have been so numbed of late). In typical Keady fashion, the Judge commandeered the local theater in Greenville for a personal viewing and held that "The motion picture 'The Fox' is hereby declared not to be obscene, in fact or in law, in accordance with the controlling decisions.[109] Meanwhile, in the Southern District, a three-judge district court showed gross insensitivity to the Constitution and, first, upheld the state's obscenity statute and, second, declared "The Fox" to be "utterly without redeeming social value," and thus "obscene."[110]

Another First Amendment case involved publication of an article written by a black student on the subject of biracial love and liberally employing four-letter words to make its point. The article was intended to be published in the student magazine, *Images*, printed under the auspices of the Department of English at the University of Mississippi. The University objected to the use of its facility—the University Printing Shop—to publish the magazine. The student sued to prevent the University from interfering with publication and distribution of the magazine containing the article. Judge Keady granted the injunction, and the Fifth Circuit affirmed.[111] The censorship was not justified on the basis that, because of the use of four-letter words, the stories were too tasteless and inappropriate to be connected with the University. The court held that the English Department had no authority to censor the contents of the magazine on the theory that the magazine would be seen speaking for the Department and the University, but that the University could insulate itself from responsibility by saying that it did not approve the publication.

---

[108] 401 U.S. 37 (1971).

[109] Camise & Collier v. Douglas, No. EC6872-K (N.D. Miss. Dec. 3, 1968).

[110] McGrew v. City of Jackson, 307 F. Supp. 754 (S.D. Miss. 1969).

Keady saw a First Amendment dimension to the right to vote. In *Jordan v. City of Greenwood*,[112] he cited with approval the view that the First Amendment assures every citizen the right to cast his vote for whatever reason he pleases, adding that "any inquiry into the motivation of individual voters who may have voted either for or against the proposed change is repugnant to our constitutional system."[113]

In *Jordan*, Judge Keady refused to order the City of Greenwood to adopt a system of single-member districts electing city councilmen. Concentrating on a 1977 referendum on the issue in which the ward system proposal had been rejected, Keady's decision emphasizes the primacy of equality of opportunity. "[N]either blacks nor any other segment of the voting population were denied the opportunity to vote in the election," and, as well, a limited judicial role "to grant plaintiffs the relief they request would mean that when faced with important elections, minority citizens could simply choose not to vote, and then challenge the election on the ground the whites who did vote defeated the proposal."[114]

It may be argued that Keady was insensitive to the effect at-large elections have on the minority community. To the contrary, the opinion may reflect instead his concern with substantive results in rejecting the black challenge. Keady found the elected city officials in Greenwood "are and have been responsible to the black community as much as to the white citizenry."[115]

---

[111] Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973).

[112] 534 F. Supp. 1351 (N.D. Miss. 1982).

[113] *Jordan*, 534 F. Supp. at 1367.

[114] *Id.* at 1366.

I think Judge Keady missed the ball in *Cook v. Hudson*,[116] a case presenting a clash between two constitutional imperatives. For several years, the court had been implementing the decree that Mississippi's public schools adopt a unitary school system. The white private school system arose in response. In *Cook*, a public school teacher had enrolled his children in an all-white private academy for the dominant purpose of avoiding the desegregated public school system. The public school system had adopted a policy which prohibited its teachers from placing their students in the private schools. Obviously, school policy was designed to prevent an activity which would substantially undermine the viability of a unitary school system. The school teacher was discharged and sued, claiming his First Amendment rights had been violated. Judge Keady upheld the discharge and dismissed the complaint, holding that the First Amendment guaranty of freedom of association did not protect the teacher. The teacher had claimed the right as a parent to send his children to the school of his choice, in accordance with the First Amendment freedom of association right, and had argued that the school board could not require him to forfeit his right as a condition of further public school employment. Keady stated that "The instant case, at first blush, may appear to present a choice between competing values that might be urged under the First Amendment and what is done in fulfillment of the Fourteenth Amendment."[117] Judge keady further found

> that the challenged rule was needed to eliminate racial discrimination from the public schools. . . . Since white flight may present a serious obstacle to effective desegregation, a school board is empowered to adopt appropriate measures in aid of the schools under its charge. . . . [A]n adequate factual basis exists for concluding that public school teachers who

---

[115] *Id.* at 1368.

[116] 365 F. Supp. 855 (N.D. Miss. 1973).

[117] *Cook*, 365 F. Supp. at 859.

> send their own children to a segregated school manifest a belief that segregation is desirable in education and a distrust in segregated schools. Actions speak louder than words, to students no less than to adults. We hold that the Board's policy, where limited to racially discriminatory private schools, is a permissible regulation, adopted in keeping with the command of the Fourteenth Amendment and the desegregation order of this Court to eliminate racial discrimination and remove its pervasive influence from the county's public schools.[118]

Of course, this ignores the Fist Amendment's shield of freedom for the thought that we hate, not to mention freedom of association with whomever we please, though some here may disagree.

My point in the end is that Judge Keady's two decades of First Amendment decisions come close to the premises embodied in that amendment, expressed so well by Holmes in the *Abrams v. United States*[119] dissent:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[120]

---

[118] *Id.* at 860.

[119] 250 U.S. 616 (1919).

[120] *Abrams*, 250 U.S. at 630.

All of this but scratches the surface. Fifteen years of service to the living Bill of Rights cannot be summarized in an evening—in a week—without glaring omissions and superficiality in considering that not omitted. Still, I have done what I could to set forth the sense of a man, a judge, who for fifteen years in the federal courthouses of Greenville, Clarksdale, Oxford and Aberdeen received the people, those timorous, imperfect, and at times abrasive and self-righteous citizens, and heard their pleas that they be given their rights. His opinions reflect that he felt the anguished clash of these claims of right with majoritarian rule, with limitations upon federal power that inhere in our federal system, with tradition and prejudice and the baser sides of life. And his work reflects that he saw both claimant and defender mired in the ambiguities and tensions between free will and determination, between liberty and equality, between autonomy and community.

In the end, he was charged to make rights real, to be the facility through which the high sounding abstractions of the Bill of Rights became meaningfully available in the lives of people you and I know. And, how often he did this. To be sure, there were times when the Fifth Circuit had a gun at his head, as in the public school desegregation cases. There were many others, including some I have mentioned, where he could have found other facts, exercised his discretion differently, been far less creative and timely with relief, or written technically competent but far more conservative opinions. Nothing in the law made Judge Keady save Aaron Henry from the hitchhiker conviction, nor did the law make him shield Skip Robinson's march in Holly Springs, or make him reject the pretexts and save David Jordan's teaching job in Greenwood. Intellectual creativity and integrity, personal sensitivity and strength of will, were the source of *Gates v. Collier* and Judge Keady's decades-long ordeal to cajole the State of Mississippi to respect the dignity, worth and humanity of those convicted of crime.

On, he was not always right. Nor is there always a right, or even an approximation of a right. But he was always there, in the fray, calling to mind Holmes: "I think that, as life is action and passion, it is required of a man that he should share the passion and action of his time at peril of being judged not to have lived."

And, what of this Bill of Rights that we commemorate and curse and revere and renounce, with all of its imperfections, additions (mis)interpretations and inconveniences? Our country adopted the document in its youth. Perhaps that was the only time we could have done so, but if that be so, we may again with Holmes say of our country:

> Through our great good fortune, in our youth our hearts were touched with fire. It was given to us to learn at the outset that life is a profound and passionate thing. While we are permitted to scorn nothing but indifference, and do not pretend to undervalue the world rewards and ambition, we have seen with our own eyes, beyond and above the gold fields, the snowy heights of honor, and it is for us to bear the report to those who come after us. But, above all, we have learned that whether a man accepts from Fortune her spade, and will look downward and dig, or from Aspiration her axe and cord, and will scale the heights, the one and only success which it is his to command is to bring to his work a mighty heart.[121]

By this standard, the work of James Madison and his colleagues has been a mighty success, and so has the work of William Colbert Keady.

---

[121] OLIVER WENDELL HOLMES, THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES, 15 (Mark DeWolfe Howe Comp. 1962).

JUDGE WILLIAM C. KEADY AND THE LAW OF SCIENTIFIC EVIDENCE

John M. Conley[*]

John B. Garver, III[**]

I. INTRODUCTION

Our assignment for the conference commemorating Judge Keady's life and work was to consider his treatment of scientific evidence. Since we did not have the privilege of knowing the judge, we were limited to the evidence of his writings, supplemented by discussions with some of his former clerks. The organizer of the program, James L. Robertson, suggested that we begin our review with the two cases that he termed Judge Keady's "twin towers": *Gates v. Collier*,[1] in which he set in motion the reform of the infamous Mississippi State Penitentiary at Parchman; and the epic saga of *Environmental Defense Fund, Inc. v. Alexander*,[2] over the course of which he beat back the environmental challenge to the Tennessee-Tombigbee Waterway. Although we were generally aware of both cases,[3] our reaction to an initial close reading of the opinions was puzzlement because neither case relied on scientific evidence. The opinion in *Gates* attacked the medieval conditions at the Parchman penitentiary on the basis of conclusory findings of constitutional fact,[4] while *Alexander* rejected strident environmental objections to the Tenn-Tom not on their scientific merit, but on not-always-convincing procedural grounds.[5]

---

[*] William Rand Kenan, Jr. Professor, University of North Carolina School of Law, A.B. Harvard; J.D., Ph.D., Duke.

[**] Partner, Robinson, Bradshaw & Hinson, P.A., Charlotte, North Carolina. B.S., United States Military Academy; J.D., Duke. The authors wish to thank University of North Carolina law students Mike Berry and Josh Lang for their expert research assistance.

[1] 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd*, 489 F.2d 298 (5th Cir. 1973).

[2] 467 F. Supp. 885 (N.D. Miss. 1979), *aff'd*, 614 F.2d 474 (5th Cir. 1980). The district court divided the plaintiffs' causes of action into three general sets of issues. *Environmental Defense Fund, Inc.*, 467 F. Supp. at 887. The district court tried the first of the three issues separately. *Id.* at 888. The court granted summary judgment to the defendants on the remaining issues in 1980. Environmental Defense Fund, Inc. v. Alexander, 501 F. Supp. 742, 746 (N.D. Miss. 1980), *aff'd in part and rev'd in part sub nom.*, Environmental Defense Fund, Inc. v. Marsh, 651 F.2d 983 (5th Cir. 1981).

At first, we suspected that Judge Robertson made a mistake; perhaps he had sent us to the wrong towers. But before calling him to confess our bewilderment, we decided to conduct our own investigation. A Lexis search for "Keady" and "expert" yielded forty-seven cases. As we began to read, we quickly realized that we had misinterpreted the absence of scientific evidence in the Parchman and Tenn-Tom cases. These other cases revealed a trial judge who was a virtuoso in understanding and presenting complex science and technology. Judge Keady was a generation ahead of his time in exercising the "gatekeeping" function that the Supreme Court imposed on federal trial judges in 1993.[6] In fact, Judge Keady had a well-developed, forceful, and sometimes controversial view of the role of science in the process of judging. Although he could not have predicted it, it is also a view that is remarkably in tune with newly-emerging sensibilities in science. As we finally came to realize, the apparent avoidance of science in *Gates* and *Alexander* was anything but. Instead, it was in each case a strategic choice reflecting a coherent view of the proper relationship between science and law.

---

[3] The elder author, Conley, vividly recalled the Tenn-Tom project as the apotheosis of environmental villainy from his earlier life as a Yankee liberal elitist.

[4] *Gates*, 349 F. Supp. at 887-88 (discussing inadequate physical facilities at Parchman penitentiary).

[5] *Environmental Defense Fund, Inc.*, 467 F. Supp. at 905-07 (holding that attack on widening of channel to 300 feet was barred by doctrine of laches).

[6] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

II. The Law, Then and Now

A. *Judge Keady and the* Frye *Test*

Throughout Judge Keady's career on the bench, the courts of the Fifth Circuit adhered to the ancient *Frye* test for the admissibility of scientific evidence.[7] *Frye v. United States*,[8] decided by the District of Columbia Circuit in 1923, involved an effort by a criminal defendant to prove his innocence by introducing the results of a primitive lie detector test. In rejecting the exculpatory evidence, the court, citing no authority, propounded the following standard: "[T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."[9] The *Frye* test presented judges with a simple empirical question: were the expert's methods generally accepted in the relevant scientific community?

Frye was followed in the federal courts almost universally until the promulgation of the Federal Rules of Evidence in 1975.[10] A question then arose as to whether *Frye* had been superseded or incorporated by Rule 702, which permits "a witness qualified as an expert by knowledge, skill, experience, training or education" to offer an opinion "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue."[11] Some courts and commentators took the position that Rule 702 gave trial judges far more discretion than *Frye,* permitting (if not requiring) them to inquire beyond the mere fact of general acceptance.[12] Despite this, *Frye*'s general acceptance test remained the majority rule until 1993.[13]

---

[7] United States v. Posado, 57 F.3d 428, 432 (5th Cir. 1995) (stating that Fifth Circuit precedent applied *Frye* test). *See* Barrel of Fun, Inc. v. State Farm Fire & Cas. Co., 739 F.2d 1028, 1031 (5th Cir. 1984) (applying *Frye* test to hold polygraph evidence inadmissible).

[8] 293 F. 1013 (D.C. Cir. 1923).

[9] *Frye*, 293 F. at 1014.

[10] David L. Faigman et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying about the Future of Scientific Evidence*, 15 CARDOZO L. REV. 1799, 1808 (1994) (stating that *Frye* became dominant test for admissibility of scientific evidence).

[11] FED. R. EVID. 702.

[12] For examples of writings on both sides of the controversy, see *Daubert*, 509

The Fifth Circuit noted in 1984 that it was an "unresolved question whether the Federal Rules of Evidence silently abolished or adopted the *Frye* test," but continued to adhere to its general acceptance standard.[14] In every case involving scientific evidence, Judge Keady was thus required to decide whether the methods on which the evidence was based met with general acceptance in the scientific community. Remarkably, however, a Lexis search of his cases revealed not a single citation to *Frye*. Moreover, the *admissibility* of expert testimony was not an issue, either at the trial or appellate level, in any of Judge Keady's reported cases. One possible explanation might have been that he was not deciding cases involving scientific evidence, but this was contradicted by our earlier discovery of forty-seven cases involving experts, most of whom were scientific experts. The only other possible explanation seemed to be that he always made the right call, or at least made the call persuasively enough to suppress objections and discourage appeals. In informal discussions, some of his former law clerks indicated that this was their view. For Judge Keady, then, the highly mechanical *Frye* standard was seldom if ever an issue, and never a constraint.

B. The Daubert *Regime*

1. Daubert *and* Joiner

In its 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that the promulgation of Rule 702 of the Federal Rules of Evidence superseded the *Frye* test.[15] The factual issue in *Daubert* was whether the antinausea drug Bendectin caused birth de-

---

U.S. at 587 n.5.

[13] *See* Faigman et al., *supra* note 10, at 1808, 1809-10 n.25 (stating that majority of jurisdictions still applied *Frye* test after enactment of Federal Rules of Evidence).

[14] *Barrel of Fun, Inc.*, 739 F.2d at 1031 n.9.

[15] *Daubert,* 509 U.S. at 589.

fects.[16] The defendant moved for summary judgment in the district court on the basis of expert testimony "that no epidemiological study[17] ever performed has concluded that the use of Bendectin by pregnant women has a statistically significant association to birth defects in these women's children."[18] The plaintiffs responded with affidavits from eight experts with "impressive credentials" who concluded "that Bendectin can cause birth defects."[19] The district court granted the defendant's motion for summary judgment, finding the plaintiff's evidence insufficient. The court held that "expert opinion which is not based on epidemiological evidence is not admissible to establish causation" because it cannot be characterized as meeting the standard of general acceptance in the relevant scientific community.[20] The Ninth Circuit affirmed.[21] The Supreme Court reversed, replacing *Frye's* general acceptance test with a new "gatekeeping" standard and remanding the case for further consideration of the evidence under that standard.[22]

---

[16] *Id.* at 582.

[17] Linda A. Bailey et al., *Reference Guide on Epidemiology, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 121, 125 (Federal Judicial Center ed., 1994). *Epidemiology* is the field of public health that studies "the *incidence*, distribution and etiology of disease in human populations." *Id.* at 125. Classic epidemiological studies compare the rate of occurrence of a disease in a population that has been exposed to a suspect agent (Bendectin, for example) to the rate in an unexposed population. *Id.* at 149-50.

[18] Daubert v. Merrell Dow Pharm., Inc., 727 F. Supp. 570, 575 (S.D. Cal. 1989), *aff'd*, 951 F.2d 1128 (9th Cir. 1991), *vacated* 509 U.S. 579 (1993). An association (or difference) of a given magnitude is deemed statistically significant if it is very unlikely to have occurred as a matter of chance alone. DAVID W. BARNES & JOHN M. CONLEY, STATISTICAL EVIDENCE IN LITIGATION 32, 33 (1986). The probability of chance occurrence is usually expressed as a *p*-value. *Id.* Thus, to determine through appropriate calculations that p=.05 means that there is a 5-in-100, or 1-in-20, probablity that an association or difference of the magnitude observed would have occurred as a matter of chance alone. *Id.* at 33 n.3. In many scientific contexts, the chance explanation will be rejected and the results deemed statistically significant if p is less than .05; that is, if there is less than a 1-in-20 probability that such results would have occurred by chance alone. If the chance explanation is rejected, then other, "real" explanations can be entertained—for example, that Bendectin does cause birth defects. *Id.* at 32-34.

[19] *Daubert*, 509 U.S. at 583.

[20] *Daubert*, 727 F. Supp. at 572, 575.

[21] Daubert v. Merrell Dow Pharm., Inc., 951 F.2d 1128 (9th Cir. 1991), *vacated*, 509 U.S. 579 (1993).

In deciding that Rule 702 had superseded the *Frye* test, the Supreme Court relied primarily on the text of Rule 702 and its drafting history.[23] The Court was persuaded by the absence in either place of any reference to *Frye* or a general acceptance standard.[24] The Court also emphasized that the *Frye* test was at odds with the "liberal thrust" and "permissive backdrop" of the Federal Rules of Evidence.[25]

To replace *Frye,* the Court imposed on trial judges a two-part obligation that it derived from the text of Rule 702: "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[26] The reliability requirement emerges from Rule 702's reference to scientific knowledge,[27] the Court explained, because "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science," and "the word 'knowledge' connotes more than subjective belief or unsupported speculation."[28] The Court discerned the relevancy requirement in Rule 702's insistence that the scientific testimony "assist the trier of fact" in order to be admissible.[29]

In deciding whether to admit scientific evidence, trial judges must make a preliminary assessment of whether the proffered testimony is scientifically valid, in the sense of being the product of the scientific method.[30] In making this assessment, trial judges are required to consider at least four factors.[31] The first factor is testability: whether a theory or technique "can be (and has been) tested."[32] The second factor is whether the work that the expert relies on has been subjected to the peer-review publication process.[33] While the presence of peer-reviewed publication weighs strongly in favor of admissibility, the lack of publication should not be viewed as fatal, as some good work may be too new, too narrow, or too innovative to have survived the peer-review process.[34] The third factor for the trial court to consider is "the known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation."[35] The Court did not define rate of error. When considering, for example, a laboratory procedure, a "rate of error" might be determined by comparing the handling of control and experimental samples. By contrast, in an epidemiological study of a possible relationship between a toxic exposure and a disease, rate of error might refer to the statistical probability that the observed relationship could occur as a matter of chance. The fourth factor is the old *Frye* question admitted by the back door: whether the work the expert relies on has found "widespread acceptance" in the relevant scientific community.[36]

---

[22] *Daubert*, 509 U.S. at 597-98. On remand, the Ninth Circuit once again affirmed the district court's grant of summary judgment. Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995).

[23] *Daubert*, 509 U.S. at 588-89.

[24] *Id.* at 588.

[25] *Id.* at 588-89.

[26] *Id.* at 589.

[27] *Id.*

[28] *Id.* at 590.

[29] FED. R. EVID. 702.

[30] *Daubert*, 509 U.S. at 589-93.

[31] *Id.* at 593-94.

The relevancy branch of the Rule 702 inquiry, the Court held, is a question of "fit": whether the scientific evidence provides helpful information on a fact in issue.[37] The Court illustrated the concept with a hypothetical about a scientifically valid study of the phases of the moon. This study might "fit" in a case where there was a factual question about whether a certain night was dark. The same study, however valid, would have no relevance to the question of whether a person was likely to have behaved irrationally on a particular night.[38]

One special point of emphasis in the *Daubert* opinion is that the trial judge is to focus "solely on principles and methodology, not on the conclusions that they generate."[39] The implication of this remark is that as long as an expert uses the scientific method, a trial court has no authority to exclude his or her testimony on the basis of disagreement with the results. This rule is easier to state than to enforce, however. How will it be possible to prove that a trial court's rejection of an expert's methods was contaminated by its reservations about the results?

---

[32] *Id.* at 593.

[33] *Id.* at 593-94.

[34] *Id.* at 593.

[35] *Id.* at 594.

[36] *Id.*

[37] *Id.* at 591-92.

[38] *Id.*

The dilemma is evident in both *Daubert* itself and the Court's follow-up decision in *General Electric Company v. Joiner.*[40] When *Daubert* was remanded to the Ninth Circuit, that court once again rejected the plaintiffs' scientific evidence, this time on the ground that it was irrelevant to the controlling legal question. The Ninth Circuit found that the plaintiffs' scientific studies were directed to the question whether "Bendectin cause[d] some birth defects," whereas the controlling legal standard was whether Bendectin "caused *their* birth defects."[41]

It is difficult to take the Ninth Circuit seriously on this point. Of course the plaintiffs' studies, as conceived by their authors, were directed to the question of whether Bendectin caused the birth defects of the plaintiffs' children. The most plausible interpretation of the Ninth Circuit's action is that the court delved into the merits of the studies and found that they could not support a finding for the plaintiff on the dispositive legal question. The argument about lack of fit was little more than a framing device to enable the court, at the admissibility stage, to dispose of evidence that it found substantively insufficient.

Joiner, like *Daubert*, was a toxic exposure case. The plaintiff electrician claimed that his small-cell lung cancer was "promoted" by extended contact with transformer coolant containing PCBs and other chemicals manufactured by General

---

[39] *Id.* at 595.

[40] 118 S. Ct. 512 (1997).

[41] Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995) (emphasis added).

Electric.[42] The district court granted summary judgment in favor of General Electric because (1) there was no evidence that Joiner had been exposed to toxins other than PCBs; and (2) Joiner's proffered evidence linking PCBs to small cell lung cancer failed the *Daubert* test because it "did not rise above 'subjective belief or unsupported speculation.'"[43] The legal issue before the Supreme Court was what standard of review should apply to the district court's exclusion of scientific evidence under *Daubert*. The Court held that the traditional abuse of discretion standard applied rather than the more stringent standard that Joiner argued for.[44] Applying this standard, the Court held that the district court had not abused its discretion in rejecting the plaintiffs' studies, but remanded the case for reconsideration of whether Joiner had been exposed to non-PCB toxins and whether any such exposure contributed to his cancer.[45]

Although the entire Supreme Court agreed on the standard of review, Justice Stevens dissented from the Court's conclusion that the district court had not abused its discretion in finding evidence of a PCB-cancer link unreliable under *Daubert*.[46] The point of contention was the elusive line between methodology and results. Tracking the district court's findings, the majority addressed the plaintiff's epidemiological studies and found that none of the studies, standing alone, provided a sufficient basis for inferring a causal link between PCB exposure and cancer. Justice Stevens argued that the one-by-one evaluation of the studies was inappropriate because the plaintiffs' experts themselves had used a scientifically accepted "weight of the evidence" approach.[47] Despite the flaws in the individual studies, the experts believed that the collective weight of the scientific evidence reasonably supported an inference of causation. This led Justice Stevens to ask, "[W]hen qualified experts have reached relevant conclusions on the basis of an acceptable methodology, why are their opinions inadmissible?"[48] His answer was that the majority had ignored "the difference between methodology and conclusions [that] is just as categorical as the distinction between means and ends," and had endorsed the district court's rejection of the plaintiffs' studies simply because it disagreed with them.[49]

---

[42] *Joiner*, 118 S. Ct. at 515-16.

[43] *Id.* at 516 (quoting Joiner v. General Elec. Co., 864 F. Supp. 1310, 1326 (N.D. Ga. 1994), *rev'd*, 78 F.3d 524 (11th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997), *rev'd*, 118 S. Ct. 512 (1997)).

[44] *Id.* at 517.

[45] *Id.* at 519.

[46] *Id.* at 523 (Stevens, J., concurring in part and dissenting in part).

[47] *Id.* at 522-23 (Stevens, J., concurring in part and dissenting in part).

The majority's preemptive response was less than compelling:

> [Joiner] claims that because the District Court's disagreement was with the conclusion that the experts drew from the studies, the District Court committed legal error . . . . *But conclusions and methodology are not entirely distinct from one another.* Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[50]

It is difficult to see the difference between finding "too great an analytical gap" and rejecting the expert's conclusions. The exclusion of Joiner's evidence may have been sensible, but the Court's opinion does little to clarify the methods-conclusions boundary. In the end, perhaps the principal value of *Joiner* will be to remind us that fixing this boundary on a case-by-case basis is likely to be the most difficult aspect of

---

[48] *Id.* at 523. Justice Stevens' point finds support in Rule 703 of the Federal Rules of Evidence, which permits experts to base their opinions on inadmissible sources as long as they are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." FED. R. EVID. 703.

[49] *Joiner*, 118 S. Ct. at 523 (Stevens, J., concurring in part and dissenting in part).

[50] *Id.* at 519 (emphasis added).

Daubert's legacy.[51]

2. *Unanswered Questions*

In addition to the method-conclusions enigma, *Daubert* left a number of specific questions unresolved, and the lower courts have already begun to struggle with several of them. The most significant procedural issue is how a trial judge is to decide whether the *Daubert* standard has been met. In most cases, expert testimony is routine and its admission is non-controversial.[52] In more difficult cases, the evolving norm seems to be an extensive "*Daubert* hearing" at which the expert testifies and is cross-examined.[53] Another possibility, still largely unexploited, is for trial judges to engage court-appointed experts under Federal Rule of Evidence 706 for the limited purpose of assessing the reliability and relevance of proffered scientific evidence. Issues of admissibility also can be dealt with in pretrial conferences conducted under Rule 16 of the Federal Rules of Civil Procedure.[54]

---

[51] The Supreme Court's other post-*Daubert* scientific evidence case is *United States v. Scheffer*, 118 S. Ct. 1261 (1998). In *Scheffer*, the Court held that the military courts' per se ban on polygraph evidence does not violate a criminal defendant's constitutional right to present a defense. *Scheffer*, 118 S. Ct. at 1268-69. The Court commented at length on the lack of consensus about whether polygraph evidence can ever meet the *Daubert* reliability standard. *Id.* at 1265-66.

Additionally, the Advisory Committee on Evidence Rules recently has published for public comment a set of draft revisions to Rules 701 through 703. The proposed Rule 702 makes clear that judges must perform a gatekeeping function with respect to all expert evidence, scientific or otherwise. However, the proposed rule does not attempt to codify the four *Daubert* factors. *Evidence-Expert Testimony: Practice Committee Approves Publication of Changes to Rules for Expert Testimony*, 67 U.S.L.W. 2025, 2025 (July 14, 1998).

[52] Margaret A. Berger, *Evidentiary Framework*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 37, 50-51 (Federal Judicial Center ed., 1994).

[53] Rule 104(a) of the Federal Rules of Evidence gives trial judges broad authority to determine questions of admissibility. FED. R. EVID. 104(a). Trial judges are not bound by the rules of evidence (except with respect to privilege) when making such determinations. *Daubert*, 509 U.S. at 592-93 (citing FED. R. EVID. 104(a)).

[54] Justice Breyer discussed these possibilities in his concurrence in *Joiner*. *Joiner*, 118 S. Ct. at 520-21 (Breyer, J., concurring). *See also* William W. Schwarzer, *Management of Expert Evidence*, *in* REFERENCE MANUAL ON SCIENTIFIC

Another question is the relationship between the admissibility and the sufficiency of scientific evidence. In theory, all of a plaintiff's evidence can be admissible yet still be insufficient to make a *prima facie* case and thus withstand a motion for summary judgment.[55] But when a plaintiff in a toxic exposure case like *Joiner* bases his case entirely on scientific evidence directed to each element of the claim, and that evidence is admitted because it is deemed both scientifically reliable and relevant to the legal issues, what possible basis can there be for finding it insufficient? Consequently, has the admissibility determination largely superseded the summary judgment standard in scientific evidence cases?[56]

A third question is the relationship between Rules 702 and 403. Rule 403 authorizes a judge to exclude otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[57] *Daubert* mentioned Rule 403 in passing, implying that it remained in effect as an independent basis for excluding scientific evidence,[58] and at least one post-*Daubert* court has suggested that Rule 403 might be used to exclude evidence that met

---

EVIDENCE 7, 13-27 (Federal Judicial Center ed., 1994). Justice Breyer also reviewed the resources available from various scientific organizations. *Joiner*, 118 S. Ct. at 520-21 (Breyer, J., concurring). *See also* Schwarzer, *supra*, at 21 (discussing use of special masters appointed under Rule 3 of Federal Rules of Civil Procedure); *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. TIMES, Feb. 17, 1998, at A17 (reporting on speech to American Association for the Advancement of Science).

[55] *Daubert*, 509 U.S. at 596; *see* Berger, *supra* note 52, at 51-52.

[56] The *Daubert* court posited a situation in which the scientific evidence, though admissible, amounts to only a "scintilla," and is thus insufficient to create an issue of fact. *Daubert*, 509 U.S. at 596. *Joiner* represents the more typical kind of case. The defendant's motion for summary judgment required the district court to determine the prospective admissibility of the plaintiff's scientific evidence. *Joiner*, 864 F. Supp. at 1319. Had at least some of it been admitted, the plaintiff almost certainly would have been held to have raised a question of material fact sufficient to go to trial. *Id.*

[57] FED. R. EVID. 403.

[58] *Daubert*, 509 U.S. at 595.

the Rule 702 standard.[59] But there is a logical question parallel to that raised in connection with summary judgment: if scientific evidence meets the rigorous tests of both scientific reliability and relevance, what other, higher standards could be applied to reject it?[60]

In addition to these operational issues, *Daubert* also raised and left unanswered a more philosophical question: how should courts deal with evidence that is universally recognized as scientific but does not fall within the specific definition of science propounded by the *Daubert* court? According to *Daubert,* science is the process of generating and testing hypotheses. Those hypotheses must be explicitly, if not quantifiably, falsifiable.[61] This definition embodies the common lay view of science as a dispassionate search for the truth conducted according to rigorously applied, value-neutral rules. Among philosophers of science, this view is called positivism.[62] Hard sciences, like experimental physics, fit comfortably within the positivist framework. However, many enterprises widely believed to be "scientific" do not. The best example may be differential diagnosis by medical doctors, which, while founded on positivist science, is in practice the exercise of highly trained judgment.[63] Differential diagnosis is a mixture of science and art, far too complicated for its accuracy to be assessed quantitatively or for a meaningful rate of error to be calculated. It therefore cannot pass the *Daubert* test as written. Yet *Daubert* surely did not mean to exclude all evidence of medical diagnosis from the courtroom.[64] The only sensible thing to do is to subject this evidence to a different standard, but the *Daubert* court left no clues as to what that standard should be.

---

[59] In *United States v. Posado,* 57 F.3d 428, 435 (5th Cir. 1995), the court repudiated the Fifth Circuit's per se rule against admitting defense polygraph evidence. It suggested the possibility of "an enhanced role for Rule 403 in the context of the *Daubert* analysis, particularly when the scientific or technical knowledge proffered is novel or controversial." *Id.* at 435.

[60] *See* Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1239 (3d Cir. 1993) (excluding economic evidence in antitrust case, with observation that Rule 403 is unlikely basis for exclusion when expert testimony meets requirements for admissibility under Rule 702).

[61] *Daubert,* 509 U.S. at 593.

[62] John M. Conley, *The Social Science of Ideology and the Ideology of Social Science,* 72 N.C. L. REV. 1249, 1254-55 (1994).

[63] *See* Berger, *supra* note 52, at 80-82; Ellen Relkin, *Some Implications of* Daubert *and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts,* 15 CARDOZO L. REV. 2255, 2258-59 (1994).

The Fifth Circuit recently confronted this issue in *Moore v. Ashland Chemical, Inc.*[65] The district court, in apparent reliance on *Daubert*, excluded the testimony of a physician that the plaintiff truck driver suffered from "reactive airways disease" as a result of being required to clean up chemicals on the defendants' premises.[66] The district court cited both Rule 702 and Rule 403 as authority for excluding the physician's testimony.[67]

A divided panel of the Fifth Circuit held initially that the general principles of *Daubert* (reliability and relevance) are applicable to all forms of scientific evidence.[68] However, the specific "*Daubert* factors" (testability, rate of error, etc.) are directed only at the category of "hard or Newtonian science," which does not include the practice of clinical medicine.[69] In Rule 702 terms, the court held, clinical medicine is a form of "technical, or other specialized knowledge."[70] Consequently, clinical medical evidence must meet only the standard of being grounded in the principles, methods, and procedures of clinical medicine itself.[71] Because the physician's opinion as to causation "was soundly grounded in traditional clinical medical knowledge, principles and methodology," including a thorough physical examination, the taking of a detailed patient history, and the use of differential diagnosis, the court found that the testimony should have been admitted.[72]

---

[64] This issue is most difficult when qualitative clinical medicine is the only evidence of causation in a toxic exposure case. *See* Berger, *supra* note 52, at 80-82.

[65] 151 F.3d 269 (5th Cir. 1998).

[66] *Moore*, 126 F.3d at 683.

[67] *Id.*

[68] *Id.* at 684-86.

[69] *Id.* at 688-90.

[70] *Id.* at 685-88.

[71] *Id.* at 686-87.

[72] *Id.* at 696-97. The court of appeals also found that the district court abused

The Fifth Circuit sitting *en banc* then reversed the panel and reinstated the judgment of the district court.[73] The court rejected the panel's conclusion that the specific *Daubert* factors apply only to "hard science."[74] It then held that the district court had not abused its discretion[75] in excluding the physician, because his testimony had failed to satisfy *any* of those factors.[76] Specifically, the court found that the witness's causation opinion ultimately rested on two bases: his reading of a materials safety data sheet (MSDS) from the manufacturer of the spilled chemicals which stated that they could irritate the lungs at some unspecified level of exposure; and the short time between the plaintiff's exposure to the chemicals and the onset of his respiratory distress.[77] Neither basis was sufficiently scientific to meet *Daubert*'s reliability standard. The MSDS said nothing about whether its conclusions were based on scientific tests, nor did it provide any information about the relationship between exposure levels and injury. The temporal proximity between exposure and illness was similarly unreliable in the absence of "appropriate validation" of the linkage or evidence of the properties of the chemicals in question.[78] The district court was thus entitled to conclude that the physician's testimony lay on the wrong side of the boundary between science and speculation.[79]

---

its discretion by rejecting the opinion under Rule 403, suggesting that Rule 403 cannot be used as an independent basis for rejecting evidence that is admissible under Rule 702. *Id.* at 704-05. The court stated, "[t]he trial court's exclusion of the evidence as unreliable under Rule 702 was manifestly erroneous and an abuse of discretion. Therefore, it cannot serve as a ground for excluding the evidence under Rule 403." *Id.* at 705.

[73] Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998).

[74] *Id.* at 275 & n.6.

[75] The *en banc* opinion placed considerable emphasis on the Supreme Court's holding in General Electric Co. v. Joiner, 118 S. Ct. 512 (1997), that the *Daubert* admissibility rulings of trial courts were to be reviewed under an abuse of discretion standard. 151 F.3d at 276-77. Although the panel in *Moore* did not have the *Joiner* opinion, it nonetheless found both clear error and abuse of discretion. 126 F.3d at 701.

[76] 151 F.3d at 279.

[77] *Id.* at 278.

[78] *Id.* at 278-79.

[79] Judges Dennis, Parker, and Stewart filed a lengthy and vigorous dissent. They argued (1) that the majority's decision conflicted with the position on medi-

Cases such as *Moore* reflect an ongoing uncertainty about the applicability of *Daubert* to evidence that is arguably scientific, but does not fit the hard, positivist model. Other areas of developing controversy include handwriting analysis, ballistics, and the other so-called forensic sciences,[80] as well as the social sciences.[81] No doctrinal consensus has emerged, and, as in *Moore*, common-sense reactions to the quality of the evidence seem to play an important role.

III. JUDGE KEADY'S SCIENTIFIC EVIDENCE CASE LAW

With this legal background, we turn to a discussion of some of Judge Keady's significant scientific evidence cases. Though operating under *Frye*, Judge Keady anticipated *Daubert* in the depth of his gatekeeping efforts and in his close scrutiny of the methods used by experts. For judges, his work is a model of how to evaluate scientific evidence; for lawyers, his opinions are a textbook on how to present it.

The first set of cases demonstrates his skill as a technician in such diverse areas as statistics and chemistry. We then see him cutting through scientific obfuscation to impose the discipline of common sense on overreaching experts. Finally, we examine the role of science in his "twin towers," the Tenn-Tom and Parchman penitentiary cases.

---

cal causation evidence taken by a number of other federal circuits; and (2) that the majority had conducted a de novo trial on the *Daubert* admissibility question, in the process ignoring the district court's errors of law, clearly erroneous findings of fact, and abuse of discretion. *Id.* at 279 (Dennis, J., dissenting).

[80] *See, e.g.*, United States v. Starzecpyzel, 880 F. Supp. 1027, 1047 (S.D.N.Y. 1995) (stating that forensic document analysis is admissible under less stringent analysis than *Daubert* analysis). David Faigman and his colleagues argue that most forensic science is amenable to empirical testing and the calculation of rates of error. 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 33-35 (1997).

[81] *See* United States v. Hall, 93 F.3d 1337, 1342-45 (7th Cir. 1996) (applying *Daubert* standard fully to social science); FAIGMAN ET AL., *supra* note 80, at 35-37.

A. Judge Keady as Technician

1. Statistics

Two employment discrimination cases, *Walls v. Mississippi State Department of Public Welfare*[82] and *Wade v. Mississippi Cooperative Extension Service,*[83] illustrate Judge Keady's ability to deal critically with complex statistical evidence. In *Walls,* several unsuccessful job applicants brought a racial discrimination action claiming that they had been unfairly denied employment.[84] Judge Keady held that the applicants were entitled to declaratory and injunctive relief, and banned the use of "unvalidated written examinations as a selection device for employment."[85] Consistent with his meticulous approach to issues involving scientific evidence, he conducted a lengthy evaluation of the credibility of the two sides' experts.[86] After an exhaustive review of the evidence, he concluded that the written examinations were invalid because "neither [their] content nor criterion validity has been sufficiently established."[87] Judge Keady disallowed the written examinations because the defendant's experts failed to demonstrate two essential elements: (1) that the required skills and aptitudes were tested in proportion to their relevant importance on the job; and (2) that there was a correlation between test scores and job performance (i.e., that the test scores reliably predicted job performance).[88]

Especially impressive was Judge Keady's facility in using several of the core concepts in statistical analysis. First, he recounted an expert's comparison of the representation of African-Americans in both the available workforce and the defendant's workforce.[89] Judge Keady characterized the underrepresentation of blacks in the Department of Public Welfare as *statistically significant*, at levels varying by year from five-in-100 (.05) to one-in-100 (.01).[90] He correctly interpreted these numbers as stating the possibility "that the low number of blacks employed in those positions was attributable to chance."[91] Quite properly, he did not immediately jump to the conclusion that this meant that the defendant had discriminated. Instead, he proceeded to an examination of job qualifications and other non-chance but non-discriminatory factors that might have accounted for the paucity of black workers.[92] As it is sometimes stated, he found that *statistical* significance did not amount to *practical* significance.[93]

---

[82] 542 F. Supp. 281 (N.D. Miss. 1982), *aff'd in part and rev'd in part,* 730 F. 2d 306 (5th Cir. 1984).

[83] 615 F. Supp. 1574 (N.D. Miss. 1985).

[84] *Walls,* 542 F. Supp. at 284-85.

[85] *Id.* at 316.

[86] *Id.* at 287-308.

[87] *Id.* at 312.

[88] *Id.* at 312-13.

He next took on the difficult process of validating an employment test. Validation comes in two flavors: *content* and *criterion*. Content validation begins with a determination of

---

[89] *Id.* at 290.

[90] *Id.*

[91] *Id.* Although this is a workably accurate definition of statistical significance, the judge conflated the concepts of statistical significance and confidence, stating that a probability of chance occurrence of a particular result (called a *p*-value) of .01 was equivalent to a "confidence level" of 99%. *Id.* In fact, the term *confidence interval* relates to sampling from a population. David H. Kaye & David A. Freedman, *Reference Guide on Statistics, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 333, 396 (Federal Judicial Center ed., 1994). A confidence interval of 95% is the range within which we would expect to find the mean (or average) of the sample 95% of the time if we were to sample randomly from the population an infinite number of times. *Id.* This is almost the same thing as saying that we are 95% certain that the mean of the actual population lies within the stated interval. *Id. See also* BARNES & CONLEY, *supra* note 18, at 32-35, 263-73.

[92] *Walls*, 542 F. Supp. at 291-94. Judge Keady made further appropriate use of statistical significance in comparing the employment test scores of black and white job applicants. *Id.* at 293. This discussion required an understanding of observed and expected values for the variable in question (pass rates). *Id.* The observed value was the actual number in each racial group who passed. *Id.* It was compared to an expected value calculated by computing the passing percentage for all applicants and multiplying it by the respective numbers of black and white applicants who took the test. *Id.* This yielded what he correctly described as "the number of blacks and whites passing and failing one would expect if the examination process had equal impact." *Id.*

[93] BARNES & CONLEY, *supra* note 18, at 34-35. The authors assert that judicial decision makers determine whether statistical evidence is practically significant. *Id.*.

"which tasks [are] necessary for successful performance of job duties in the contested positions,"[94] and proceeds to an assessment of whether the examination in question actually measures the ability to perform those tasks.[95] Reviewing each of the state's tests in detail, Judge Keady provided convincing support for his conclusion that the content of the tests bore little relation to the demands of the jobs in question.[96]

Criterion validation assesses "the degree of relationship between test scores and a measure of job performance."[97] Ideally, an employer finds over time that those who score higher on the pre-employment test also do better on reliable measures of job performance. Judge Keady acknowledged that there were statistically significant *correlations*[98] between test scores and several individual measures of job performance.[99] Astutely, however, he looked behind the raw statistics to discover flaws in the way the state measured job performance. Two particular problems were (1) the failure of the state's performance rating system to measure the job dimensions that the incumbents thought were relevant[100] and (2) the fact that "the differences between black and white test scores was 6.5 times larger than the differences in job performance as rated by supervisors,"[101] meaning that the supervisors failed to see much on-the-job difference between those who had done well on the test and those who had done poorly. These factors led Judge Keady to reject the state's claim of criterion validity as well.[102]

The reader should not infer that Judge Keady's skepticism about the statistics in *Walls* was result-driven. In *Wade v. Mississippi Cooperative Extension Service,* he asked the same questions but reached a different result by approving an employment test because it had a "manifest relationship to the employment in question."[103] The test in *Wade* was used to determine promotions and merit pay increases.[104] Here, as in *Walls*, there was a statistically significant difference between the test scores of black and white employees.[105] Here, however, this finding did not lead Judge Keady to an inference of unlawful discrimination.[106] Recognizing that statistical significance merely excludes a chance explanation for the discrepancy—but does not *prove* discrimination or any other specific nonchance explanation—he examined the record for evidence of systematic differences between black and white test-takers.[107] He found uncontradicted expert testimony that "[t]o the extent that blacks have the same academic training with advanced degrees and experience as whites, the differences [in test scores] are minimal."[108] In other words, the average score differential was attributable to permissible factors such as disparities in educational preparation and experience.

---

[94] *Walls*, 542 F. Supp. at 294.

[95] *Id.*

[96] *Id.* at 294, 312.

[97] *Id.* at 298.

[98] *Id.* at 298-99. Judge Keady concluded that the mathematical associations between the two were too strong to be reasonably attributable to chance. *See* BARNES & CONLEY, *supra* note 18, at 93-98, 109-11.

[99] *Walls*, 542 F. Supp. at 298-99.

[100] *Id.*

[101] *Id.* at 299.

[102] *Id.* at 300.

As he did in *Walls*, Judge Keady also reviewed the validity of the test. Once again, the outcome was different. He accepted evidence that it would be impossible "to develop quantitative measures to establish criterion validity."[109] Nonetheless, he concluded that the test measured a sufficient number of relevant job skills to be deemed "objective, nondiscriminatory, and content valid," and was thus legally defensible.[110]

---

[103] *Wade*, 615 F. Supp. 1574, 1580 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

[104] *Id.* at 1574.

[105] *Id.* at 1579.

[106] *Id.* at 1581.

[107] *Id.*

[108] *Id.* at 1580.

[109] *Id.* at 1575.

[110] *Id.* at 1581.

2. *Engineering*

In *Mayor of Columbus v. Clark-Dietz Associates-Engineers, Inc.*,[111] Judge Keady taught the legal world how to build a levee. The case involved a liability dispute over the failure of a protective levee surrounding the construction site of a wastewater treatment plant.[112] Judge Keady found that Clark-Dietz's design "was not reasonably prudent from an engineering standpoint and this deficiency proximately caused the levee failures."[113] Among other shortcomings, Clark-Dietz failed to prepare drawings or specifications for major portions of the project[114] and neither computed nor tested the strength of a cement-bentonite slurry used in a wall contained within the levee.[115]

What is remarkable by judicial standards is the depth of the opinion's discussion of the engineering issues. We, irredeemable Luddites, were able to use the text of the opinion to prepare fairly detailed drawings of the levee and its enclosed slurry wall. We also learned how to calculate the "safety factor" of the slurry used in the wall by multiplying the unconfined compressive strength of the slurry (in pounds per square inch) by a coefficient of 2.6 and then dividing that product by the external pressure that would be exerted on the slurry (again in pounds per square inch).[116] As Judge Keady demonstrated, and we confirmed on our calculator, the proper safety factor is at least 2.5, but in this case it was only 1.6.[117]

But this engineering tour de force did far more than impress and entertain. It allowed Judge Keady to avoid the equally unsatisfying staples of technical cases: adopting verbatim the report of one side's expert or splitting the middle between the experts. Instead, working through the strengths and weaknesses of the various experts' analyses, he wrote his own report, a rare and persuasive combination of technical sophistication and plain English.

---

[111] 550 F. Supp. 610 (N.D. Miss. 1982).

[112] *Clark-Dietz,* 550 F. Supp. at 612.

[113] *Id.* at 617. There was a complex allocation of liability among Clark-Dietz, the City as owner of the project, and a construction company called Basic. *Id.* at 627-28.

[114] *Id.* at 614.

[115] *Id.* at 615-16.

[116] *Id.* at 616.

[117] *Id.*

3. *Chemistry*

Dow Chemical Co. v. Halliburton Co.[118] is the equivalent of *Clark-Dietz* in the field of chemistry. *Dow Chemical* was a patent infringement case in which Judge Keady found the plaintiff's patents partly valid and partly invalid.[119] The patents were based on a complicated chemical process involving oxidizing agents.[120] With customary enthusiasm, Judge Keady dove into the details of the process and the competing claims of the various experts. As in *Clark-Dietz,* the outcome was neither credulous acceptance nor mindless middle-splitting, but a careful and coherent claim-by-claim analysis of the patents.[121]

One of us (Conley) teaches patent law, and he was particularly gratified by Judge Keady's handling of the issue of obviousness. In order to be patentable, an invention must be, among other things, *nonobvious* "at the time the invention was made to a person having ordinary skill in the art" to which the invention pertains.[122] This means that the patent office and any court which subsequently reviews the validity of the patent must assess what a person of ordinary skill in the art would have known, put itself in the shoes of such a person, and decide whether the invention would have seemed obvious at the time of its conception to that person. In Conley's experience, too many judges turn this into an entirely subjective inquiry, effectively substituting a standard of "if I can understand it now it must have been obvious then."[123] Judge Keady resisted this temptation. Instead, he gave a detailed and sensible definition of what constituted a person of ordinary skill in the art at the relevant time. For example, the person need not have possessed "a high level of theoretical understanding," but would have known how metal behaves.[124] He then reviewed the patents and other teachings of which such a person would have known.[125] Most impressively, he brought this hypothetical person back into play to criticize as unrealistic a test conducted by one of the defendants: "one skilled in the art would know better."[126]

---

[118] 631 F. Supp. 666 (N.D. Miss. 1985).

[119] *Dow Chem. Co.*, 631 F. Supp. at 709-10.

[120] *Id.* at 673-74.

[121] *Id.* at 706. The claims comprise the operative section of the patent, the place in which the inventor defines the aspects of the invention that cannot be duplicated. 35 U.S.C. § 112 (1984).

[122] *Dow Chem. Co.*, 631 F. Supp. at 704 (construing 35 U.S.C. § 103(a)).

[123] This is Conley's view of the Supreme Court's leading nonobviousness case,

4. *Summary*

These cases are but a small sample of Judge Keady's technical jurisprudence. They were selected to demonstrate the depth and the breadth of his mastery of scientific evidence. There are differences of opinion as to how much of the credit for this astute work belongs to him, and how much to his law clerks. But choosing good law clerks and listening to them is at least as significant a judicial skill as being able to understand science. We ask, therefore, what difference does it make?

B. Fun With Experts

Judge Keady's clerks were unanimous in reporting how much he enjoyed the sporting aspects of expert testimony. At times, the judge derived pleasure from using common sense to put experts in their place. At other times, his pleasure came from the pure comic relief provided by experts indulging in forensic theater of the absurd.

Cochran v. Rockwell International Corp.[127] fell into the former category. Cochran was a pilot who brought a product liability suit against an aircraft manufacturer over injuries

---

which involved that ancient and humble device, the plow. Graham v. John Deere Co., 383 U.S. 1 (1966).

[124] *Dow Chem. Co.*, 631 F. Supp. at 682.

[125] *Id.* at 682-83, 699-700.

[126] *Id.* at 698-99.

[127] 564 F. Supp. 237 (N.D. Miss. 1983).

allegedly incurred in a forced landing.[128] Judge Keady observed that the case turned on "whether plaintiff was injured at all in the forced landing."[129] Cochran sought to support his claim with opinion testimony from two physicians.[130]

Judge Keady's dissection of Cochran's case was a masterpiece of dry understatement. Among the highlights:

-At the time of the forced landing, Cochran "was seated next to a window, or door, made of thin plexiglass only inches from his left shoulder . . . . No part of the plexiglass or door stripping, was bent or broken in the forced landing."[131]

-After the forced landing that allegedly caused the injury, "plaintiff re-entered the plane, revved up the engine and flew the [plane] back to the airstrip."[132]

-"Since it is apparent that plaintiff has somewhat belatedly associated his present back condition with [the original forced landing], the court has paid close attention to his known history of accidents in cars or trucks, as well as in airplanes."[133]

-Six years after the alleged incident, at about the same time as he filed suit, "plaintiff made a forced landing in another airplane after the engine stalled and the plane, upon touching down, turned completely over on the wings. . . . Alone in the plane, plaintiff was left hanging in the harness and he had to cut himself loose from it; this caused him to fall several feet on his head."[134]

-For the coup de grace, "[p]laintiff did not inform [his orthopedic expert] of the inverted airplane landing that occurred one month before the examination, nor of the 1979 accident of the truck turning on its side."[135]

At the conclusion of this evidence, Judge Keady ruled that the plaintiff "failed to carry his burden of proving by a preponderance that he in fact sustained personal injury proximately related to the incident that he complain[ed] of in his action."[136] Sometimes a judge who is paying attention can ruin an expert's whole day.

---

[128] *Cochran*, 564 F. Supp. at 238.

[129] *Id.* at 239.

[130] *Id.* at 241.

[131] *Id.* at 239.

[132] *Id.* at 238-39.

[133] *Id.* at 240.

[134] *Id.* at 241.

[135] *Id.*

Judge Keady's law clerks had vivid recollections of two other cases that fell into the comic relief category, *Bailey v. Defenbaugh & Company*[137] and *Boone v. Tillatoba Creek Drainage District.*[138] In *Bailey*, a husband and wife who had borrowed $400 brought an action against a small loan company under the federal Truth in Lending Act and the Mississippi Small Loan Regulatory Act.[139] Judge Keady allowed "a veteran used-car salesman" to testify as an expert for the plaintiffs to prove the value of a wrecked 1974 Chevy Vega.[140] The expert compared the Vega to the Ford Edsel, and set its value at "about $25."[141] Judge Keady adopted the expert's opinion, and the case remains the last word on Vega valuation.

Boone involved a suit by environmentalists to stop a drainage project because of the alleged insufficiency of the defendant's environmental impact statement.[142] The only specific omission the plaintiffs asserted was a failure to analyze the affected creek's suitability as habitat for the American alligator.[143] The problem for the plaintiffs, as Judge Keady observed, was that alligators had never been found to exist in the Tillatoba Creek area.[144] In denying the plaintiffs an injunction, Judge Keady observed memorably that "there is no shortage of American alligator habitats—there is only a shortage of

---

[136] *Id.* at 242.

[137] 513 F. Supp. 232 (N.D. Miss. 1981).

[138] 379 F. Supp. 1239 (N.D. Miss. 1974).

[139] *Bailey*, 513 F. Supp. at 234-36.

[140] *Id.* at 234.

[141] *Id.* An intact and operable Vega would have been worth "no more than $400" at retail. *Id.* The senior author (Conley) found this aspect of the case personally painful, since the Vega was his first car purchase and he had thought it a shrewd investment.

[142] *Boone*, 379 F. Supp. at 1240.

[143] *Id.*

[144] *Id.* at 1242.

American alligators".[145]

C. The Role of Science in Policy Questions: The Tenn-Tom Litigation

Judge Keady's handling of the scientific evidence in the Tenn-Tom litigation presents a stark contrast to the dispassionate technical approach he took in so many other cases. What emerges from the Tenn-Tom cases is a picture of a judge driven by a vision of progress for his still-impoverished state and unwilling to let science stand in the way. His treatment of the expert evidence in his three principal Tenn-Tom opinions[146] was unabashedly result-driven.

The Tenn-Tom is a waterway designed by the Army Corps of Engineers to connect the Tennessee River with the Gulf of Mexico. The Tenn-Tom extends 253 miles across Mississippi and Alabama, linking up with a preexisting waterway, the Black Warrior Tombigbee, which in turns leads to the Gulf port of Mobile, Alabama. Although Congress authorized the Tenn-Tom project in 1946, serious planning did not commence until the mid-1960s and construction finally began in the 1970s.[147] In 1971, a group of environmentalists challenged the sufficiency of the Corps' environmental impact, engineering, and economic studies.[148] The Corps and the project's local promoters made optimistic, if not grandiose, claims about traffic levels and derivative economic benefits.[149] The environmentalists—later joined by the Louisville and Nashville Railroad, which feared the competition[150]—told a story of ecological ruin and fiscal profligacy.[151]

---

[145] *Id.*

[146] Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army, 348 F. Supp. 916 (N.D. Miss. 1972), *aff'd*, 492 F.2d 1123 (5th Cir. 1974); Environmental Defense Fund, Inc. v. Alexander, 467 F. Supp. 885 (N.D. Miss. 1979), *aff'd*, 614 F.2d 474 (5th Cir. 1980); Environmental Defense Fund, Inc. v. Alexander, 501 F. Supp. 742 (N.D. Miss. 1980).

[147] Environmental Defense Fund v. Marsh, 651 F.2d 983, 986-87 (5th Cir. 1981).

[148] *Corps of Eng'rs*, 348 F. Supp. at 920-21.

[149] *Id.* at 924.

[150] JEFFERY K. STINE, MIXING THE WATERS 21-22 (1993). Stine offers a thorough history of the project. *Id.*

By the accounts of his clerks, Judge Keady was persuaded from the outset of the economic benefits of the project. He clearly believed that social progress in Mississippi depended upon expanding economic opportunity, and he saw the Tenn-Tom as a vital elemen in this process.[152] Thus motivated, he produced a set of opinions which are a civil procedure textbook, hoisting the environmentalists on a variety of procedural petards while either ignoring or denigrating their scientific evidence.

The first skirmish occurred in 1971, when the Environmental Defense Fund (EDF) and others filed a lawsuit in the federal district court in Washington, D.C., alleging that the Corps' initial environmental impact statement failed to meet the requirements of the then-new National Environmental Policy Act of 1969 (NEPA).[153] After a district judge in Washington issued a preliminary injunction against the project, the case was transferred to Judge Keady.[154] The trial involved eight days of testimony by leading national experts in the various biological sciences.[155] Although Judge Keady later made the self-deprecating suggestion that all of this was beyond a man who had taken only one high school biology course,[156] his scientific evidence jurisprudence leads one to conclude that he understood everything that was going on.

Judge Keady's opinion carefully recited each of the plaintiffs' objections under such categories as "fauna," "water quality," and "geology."[157] Although the essence of his holding was that the Corps had followed NEPA guidelines, he took a number of subtle substantive shots at the plaintiffs and their experts.[158] He commented on such esoterica as ecological balance and the metaphysical significance of individual species,[159] the accuracy of the Corps' discussion of aquatic organisms,[160] "the project's effects upon the benthic community,"[161] and the ability of bird species to adapt to environmental disturbance.[162] These comments are starkly political and clearly at odds with the sophisticated scientific commentary in so many of Judge Keady's other opinions. For example, the statement that "the great majority of species perform no unique role or function that cannot be performed by other species"[163] is preposterous. His ridicule of the "narrow view of the taxonomist who would attach significance to every species, irrespective of its role or function"[164] is embarrassing. His contempt for the outsiders who sought to impose their views on the impoverished people of northern Mississippi is transparent.

---

[151] *Corps of Eng'rs*, 348 F. Supp. at 920, 922-24.

[152] STINE, *supra* note 150, at 122. Both sides of the suit believed Keady to be sympathetic to those views which supported the economic advancement of the region. *Id.*

[153] *Corps of Eng'rs*, 348 F. Supp. at 920-21. The National Environmental Policy Act is codified at 42 U.S.C. §§ 4321-4370.

[154] *Corps of Eng'rs*, 348 F. Supp. at 921.

[155] STINE, *supra* note 150, at 124. The plaintiffs opted only to use experts from outside the South, disregarding any attempts to impress Keady by using southern experts. *Id.*

[156] *Id.*

[157] *Corps of Eng'rs*, 348 F. Supp. at 933-37.

Such comments are but a small part of the overall opinion. The Fifth Circuit ignored the comments in upholding Judge Keady's essentially procedural conclusion that the Corps' analysis, whether ultimately right or wrong, was sufficient to discharge its obligations under NEPA.[165] A unanimous panel affirmed Judge Keady's order dissolving the preliminary injunction that had been issued by the federal judge in the District of Columbia.[166]

By the time of the next round, Judge Keady's patience with the plaintiffs was worn to the breaking point. In reviewing the case in 1976, EDF and its railroad allies were armed with five years of experience in obstructionist NEPA litigation.[167] But

---

[158] *Id.* at 934-36.

[159] *Id.* at 934.

[160] *Id.* at 935.

[161] *Id.*

[162] *Id.* at 936.

[163] *Id.* at 934.

[164] *Id.*

[165] Environmental Defense Fund, Inc. v. Corps of Eng'rs of the United States Army, 492 F.2d 1123, 1141 (5th Cir. 1974).

[166] *Id.*

[167] STINE, *supra* note 150, at 201. The plaintiffs drew heavily from arguments

Judge Keady had been paying attention as well, and he had honed his procedural arsenal. The first several sentences of his next opinion are worth quoting in full:

> In 1971 a group of environmentalists challenged the validity of the Tennessee Tombigbee Waterway (TTW), a navigational project in Alabama and Mississippi which Congress authorized in 1946. The original complaint, asserting six causes of action for alleged violation of various statutes, was dismissed with prejudice by the district court. The Fifth Circuit on appeal affirmed, and certiorari was not sought.
>
> Now, six years later and after the project is estimated to be about 29% complete and Congress has appropriated almost $600,000,000 toward the construction of the waterway, the project has again been challenged in a broad-scale attack by a coalition of environmentalists and a railroad. Some plaintiffs in the present action were parties in the prior litigation.[168]

The essential points are, of course: (1) this project was authorized in 1946, and it took twenty-five years for anyone to object; (2) these plaintiffs have been here before, and they were thrown out the first time; (3) the alliance of self-proclaimed environmentalists and a railroad is highly suspicious; and (4) an enormous amount of work has been done and a great deal of money has come to Mississippi, with more on the way.[169]

The legal issue decided in this opinion was whether the Corps had the authority to go forward with construction in light of the substantial design changes it had made to the project over the years.[170] Judge Keady found initially that the plaintiffs were barred by the doctrine of laches from objecting to any design changes made prior to the commencement of the 1971 litigation.[171] The principal objection was to the Corps' decision to widen the channel from 173 feet to 300 feet; Judge Keady found their delay in asserting this claim "long and in-

---

used in previous Tenn-Tom litigation. *Id.*

[168] *Alexander*, 467 F. Supp. at 887 (citations omitted).

[169] *Id.*

[170] *Id.* at 887-88

[171] *Id.* at 907.

excusable."[172] He then waded through the details of each of the post-1971 design changes, concluding that since none of the changes affected the scope or purpose of the project, they were within the discretionary authority of the Corps.[173] While Judge Keady's recitation of the facts evidenced a clear understanding of the engineering issues, his treatment of the plaintiffs' objections was peremptory.[174] Once again, the Fifth Circuit affirmed his entry of judgment for the defendants.[175]

With the issue of the Corps' authority to proceed disposed of, the litigation moved on to the other issues raised in the 1976 lawsuit. The most significant of these were whether the Corps was required to file a supplemental environmental impact statement because of changes to the project, and whether the Corps had properly calculated certain costs and benefits.[176] These and the other remaining issues were put before Judge Keady in the form of cross-motions for summary judgment that he considered in the summer of 1980.[177] He ruled for the defendants, dismissing all but one count of the complaint.[178] The plaintiffs again appealed, and this time Judge Keady's ever-growing impatience with the plaintiffs' Fabian tactics got him into trouble with the Fifth Circuit.

Judge Keady's opinion was thirty-one printed pages, but this was apparently not long enough for the court of appeals. In the only such instance we found in his scientific jurisprudence, he was repeatedly taken to task for the inadequacy or insufficiency of his findings. Ironically (in light of his facility with statistical evidence), on the environmental impact issue he was rebuked for his erroneous interpretation of the word "significant." He found that neither changes in projected traffic levels nor increased land use, nor a shift from a "perched canal" to a "chain-of-lakes" design, was significant enough to require a supplemental impact statement.[179] On the question of traffic levels, the court of appeals found that he did not even mention these new projections.[180] On the land issue, his findings were "inadequate";[181] and on the design change he was criticized for credulously adopting the Corps' position that the new design was environmentally superior to the original.[182]

---

[172] *Id.*

[173] *Id.* at 908-913.

[174] *Id.*

[175] *Alexander*, 614 F.2d at 481.

[176] Environmental Defense Fund, Inc. v. Alexander, 501 F. Supp. 742, 746 (N.D. Miss. 1980), *aff'd in part and rev'd in part sub nom.* Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981).

[177] *Id.*

[178] *Id.*

Even procedure failed him. In the previous opinion, he had dismissed several of the plaintiffs' claims under the doctrine of laches.[183] This time he tried res judicata. He took the position that the plaintiffs were barred from arguing that the various design changes required a supplemental environmental impact statement because those changes had already been deemed insignificant earlier in the litigation.[184] The court of appeals attacked this logic on the grounds that what is insignificant for one purpose can be highly significant for another:

> [T]he word "significant" draws its meaning from its context, and what is "significant" to the environment may be entirely different from what is "significant" to the existence of legal authority. . . . For this reason, we do not believe that the findings made in the legal authority trial finally determined the environmental issues in dispute in this case.[185]

---

[179] Environmental Defense Fund v. Marsh, 651 F.2d 983, 992-94 (5th Cir. 1981).

[180] *Marsh*, 651 F.2d at 992.

[181] *Id.* at 993.

[182] *Id.* at 994.

[183] Environmental Defense Fund, Inc. v. Alexander, 467 F. Supp. 885, 907 (N.D. Miss. 1979), *aff'd*, 614 F.2d 474 (5th Cir. 1980).

[184] Environmental Defense Fund v. Alexander, 501 F. Supp. 742, 753-54, 756 (N.D. Miss. 1980), *aff'd in part and rev'd in part sub nom.*, Environmental Defense Fund v. Marsh, 651 F.2d 983 (5th Cir. 1981).

[185] *Marsh*, 651 F.2d at 994; *see also id.* at 995 (explaining that most critical issue in present case, significance of new design's environmental impact, was not addressed in prior case). Curiously, the court of appeals indicated that Judge Keady believed that the second case (the one filed in 1976 and tried in 1979) was the proceeding that had the res judicata effect. *Id.* at 994-95. Judge Keady, however, made repeated references to the preclusive effect of the 1971 case. *Alexander*, 501 F. Supp. at 748-50, 756.

Although the Fifth Circuit was "extremely reluctant to interfere with the construction of a project that Congress has authorized for the last ten years and that is now fifty-five percent complete,"[186] it decided to interfere anyway. Stopping short of a complete shutdown, the court ordered Judge Keady to enjoin (1) any construction or contract-letting on the chain-of-lakes segment, and (2) any activity significantly affecting the environment of post-1971 land acquisitions.[187] The court also ordered the Corps to prepare the supplemental environmental impact statement that the plaintiffs demanded.[188]

Although Judge Keady lost this battle, he and the Tenn-Tom promoters won the war, and in surprisingly short order. A series of ostensibly minor procedural rulings expanded Judge Keady's discretion in ordering and policing injunctive relief.[189] The parties agreed to a modified injunction that allowed much of the work to proceed. The Corps filed its final supplemental environmental impact statement in April 1982, and the plaintiffs filed voluminous objections on June 28. The Corps rejected them out of hand two days later, and Judge Keady allowed the Corps to proceed on all remaining aspects of the project on July 20, 1982.[190]

Remarkably, once the litigation ended, the Tenn-Tom virtually disappeared from the national consciousness. Economically, it has had a significant impact, even if it has fallen far short of the optimistic, sometimes grandiose, projections of its advocates. The ecological impact seems to have been minimal, although it did give rise to a garbage disposal industry located in some of the most economically disadvantaged areas of the country.[191]

---

[186] *Marsh*, 651 F.2d at 1006.

[187] *Id.*

[188] *Id.*

[189] *See* STINE, *supra* note 150, at 215-17 (summarizing this part of case).

[190] *Id.* at 217.

[191] *Id.* at 246-251. *See also* Christopher Sheffield, *Tenn-Tom Faces Greater Challenges*, MISS. BUS. J., Feb. 10, 1997, at 7 (discussing economic impact of Tenn-Tom project); Pete Zurales, *Tenn-Tom Has Paid Off in New Jobs, Study*

It is difficult to sympathize with Judge Keady's cavalier treatment of many of the serious environmental issues raised in the Tenn-Tom litigation. But it is easy to sympathize with—indeed, to admire—his conviction that Mississippi's future depended on economic development. He saw the litigation not as a legitimate scientific dispute, but as a conflict of philosophies: on one side, an elitist, largely foreign environmentalism whose advocates did not understand Mississippi (and who were in unholy and hypocritical alliance with the railroads); on the other, hard-headed realists who knew that poverty was the worst kind of environmental degradation. The former used science as their cover story; the latter, including Judge Keady, viewed it as just another litigation tactic to be defeated. He undoubtedly knew that the Tenn-Tom was at best a risky economic bet, but it was the only horse in the race.

D. Science and Humanity: The Parchman Penitentiary Case

Judge Keady's other "twin tower" was *Gates v. Collier*,[192] the opinion that began the process of reforming the infamous Parchman penitentiary.[193] The case was filed in early 1971 by Roy Haber, a young New York divorce lawyer who had moved to Mississippi a year earlier to take up the cause of civil rights.[194] Several studies and investigations of Parchman were underway at approximately the same time, including those by a committee of the Mississippi legislature, a team from the University of Georgia, a consultant committee of national experts engaged by the Mississippi State Planning Agency and the federal Law Enforcement Assistance Administra-

---

Shows, J. COMMERCE, Sep. 7, 1995, at 7B (discussing economic impact of Tenn-Tom project).

[192] 349 F. Supp. 881 (N.D. Miss. 1972). This opinion began twenty years of litigation, which ultimately resulted in dismissal of the case by the Fifth Circuit in 1992. Gates v. Collier, 963 F.2d 370, 370 (5th Cir. 1992).

[193] *Gates*, 349 F. Supp. at 886 (providing background concerning problems at Parchman penitentiary).

[194] *Id.* at 885. *See* Roy Reed, *Pressure Mounts for Prison Reform in Mississippi*, N.Y. TIMES, Sep. 18, 1972, at 28 (discussing Roy Haber's background and detailing how case got to court).

tion, and a blue-ribbon committee appointed by Governor William L. Waller.[195] Judge Keady certified the case as a class action comprising two subclasses: all inmates, who charged that the conditions of confinement violated their civil rights; and black inmates, who in addition alleged racial discrimination.[196] After extensive discovery, he set the case for trial on May 15, 1972. The parties (the plaintiffs, the defendant state, and the United States Department of Justice, which had intervened as a plaintiff),[197] however, consented to let the court rule on the basis of the written record alone.[198]

On September 13, 1972, Judge Keady issued a scathing opinion that was followed by a remedial order dated October 20.[199] In a set of brutally explicit findings of fact, he detailed abuses that Solzhenitsyn might have recognized. For example, each of Parchman's twelve "camps" had only four civilian employees, only one of whom could remotely be described as a guard.[200] In the virtual absence of trained guards, order, such as it was, was maintained by "trusties."[201] These were inmates, unscreened and untrained but nonetheless armed, who carried out a reign of terror in the name of discipline.[202] Hard cases were dealt with in the "dark hole," a six foot by six foot cell "with no lights, commode [save for a hole in the floor], sink or other furnishings," where inmates were confined for up to three days "naked, without any hygienic materials, and often without adequate food."[203]

Judge Keady held that these and other atrocities were so shocking to the conscience of reasonably civilized people as to constitute cruel and unusual punishment violative of the Eighth Amendment.[204] He also found that the "policy of segregating inmates by race, unrelated to prison security and discipline, was in violation of the Equal Protection Clause of the Fourteenth Amendment."[205] He issued an order requiring some changes to be implemented immediately and others over the longer term.[206] Thus began the direct oversight of Parchman by Judge Keady and his successors that lasted until 1990.[207]

---

[195] *Gates*, 349 F. Supp. at 891. *See Mississippi Urged to Revamp Prison,* N. Y. TIMES, Oct. 8, 1972, at 8 (discussing Governor Waller's committee and its recommendations).

[196] *Gates*, 349 F. Supp. at 885 n.1.

[197] *Id.* at 885. The alliance between Haber and the federal government was an uneasy one. He eventually came to suspect collusion between the Justice Department and the state authorities. Reed, *supra* note 194, at 28.

[198] *Gates*, 349 F. Supp. at 886.

[199] *Id.* at 898.

[200] *Id.* at 886.

[201] *Id.* at 887.

[202] *Id.* at 888-89.

[203] *Id.* at 890.

Science plays no overt role in this remarkably forthright opinion. The various commissions and panels had expert members who presumably conducted scientific analyses.[208] Judge Keady mentioned several of them,[209] and cited the recommendations of the Mississippi State Planning Agency/LEAA Committee that Parchman no longer be operated as a for-profit farm and that the use of trusties to maintain discipline through fear be abolished.[210] But his specific findings of fact were stated as straightforward observations, and his conclusions of law as self-evident inferences. The tenor of the opinion was, "These things are going on, and any decent and sensible person can see that they are cruel and unusual."

This was, in our judgment, a sound strategy. The decision was an indictment of people who were not only powerful but were Judge Keady's legal and political peers. For example, John Collier, the Parchman superintendent named as defendant, was Governor Waller's wife's cousin and a prominent Delta planter. (By the press accounts of the time, he was also a principled man, even if professionally unqualified, and had already taken several small steps in the right direction.)[211] Better to take full personal responsibility for the decision than to leave room for argument over the validity of some scientific predicate.

---

[204] *Id.* at 893-94.

[205] *Id.* at 893.

[206] *Id.* at 898-905.

[207] *Jail Supervision Ends*, NAT'L L. J., Nov. 5, 1990, at 6.

[208] *Gates*, 349 F. Supp. at 892. The Mississippi State Planning Agency/LEAA Committee, for example, included architects and professional penologists. *Id.*

[209] *Id.* at 891-92.

[210] *Id.* at 892. *See* Roy Reed, *Reform Pushed for Mississippi Prison*, ATLANTA CONSTITUTION, Sep. 20, 1972, at 20-A.

A brief comparison with the Supreme Court's decision in *Brown v. Board of Education*[212] is instructive. In *Brown*, the Court declined to treat the proposition that separate is inherently unequal as absolutely self-evident.[213] Instead, in a now-famous footnote, it cited the findings of numerous social scientists.[214] Critics, some very prominent, were able to attack the decision on its methodology, sidestepping the question of its outcome.[215] Perhaps this contributed to the utter lack of deliberate speed in its implementation. Judge Keady chose the direct path, making himself and his logic the only target for potential critics. Both he and his logic proved unassailable.

E. Epilogue: Joiner *and Vindication*

The Supreme Court's recent opinion in *General Electric Company v. Joiner*[216] deserves a final mention. As noted earlier, the essential holding of *Joiner* is that trial court decisions about the admissibility of expert testimony, like other admissibility rulings, should be reviewed under the deferential abuse of discretion standard.[217] This undoubtedly would have pleased Judge Keady, who, as far as we can determine, was never held to have abused his discretion on a question of the admissibility of scientific evidence.

---

[211] *See id.;* Roy Reed, *Parchman Still Has Long Way to Go,* ATLANTA CONSTITUTION, Sep. 21, 1972, at 22-B (discussing history of Parchman and pressures for reform).

[212] 347 U.S. 483 (1954).

[213] *Brown*, 347 U.S. at 494-95 n.11.

[214] *Id.*

[215] Senator James Eastland of Mississippi—ironically, an ally of Judge Keady in the Tenn-Tom fight—sought to undermine the constitutional status of the decision by introducing a resolution in the Senate that began, "Whereas this decision was based solely and alone on psychological, sociological and anthropological considerations." Others called the social scientists "Commies." Lawrence Rosen, *The Anthropologist as Expert Witness*, 79 AM. ANTHROPOLOGIST 555, 561 (1977) (providing insightful analysis of problems of basing legal doctrine on social science from viewpoint of lawyer-anthropologist).

[216] 118 S. Ct. 512 (1997).

[217] *See supra* notes 44-45 and accompanying text.

Judge Keady compiled this perfect record under the general acceptance standard of *Frye*. We are certain, though, that he would have been equally successful under *Daubert's* gatekeeping regime. The cases show him to have been an extremely energetic gatekeeper years before the law required him to be. He understood the scientific method in a wide range of applications. He was adept at distinguishing science from scientism. His critiques were invariably on the mark, and we never found an instance in which he was fooled. Most important, he had the sense to know when science should defer to human judgment and the courage to say so. And he did it all with a sense of humor.

IV. JUDGE KEADY'S JURISPRUDENCE AND THE EVOLVING PHILOSOPHY OF SCIENCE

Our final thoughts concern the relationship between science and the rest of the human enterprise. Judge Keady saw clearly the limitations of science. No amount of science could have convinced him that Cochran, the rogue crop duster, was other than a fraud. More seriously, it would have taken a great deal more environmental science than was brought before him to dissuade him from his vision of the Tenn-Tom project as an engine of economic growth for Mississippi. And he needed no science to apprehend the inhumanity of the Parchman penitentiary. To put the point in academic terms that Judge Keady probably would not have liked, he never succumbed to the modernist illusion of science as an intellectual and practical panacea. Although he would have disliked his fellow-travelers, his informed skepticism fits much better with the contemporary or "postmodernist" view that science provides partial answers to a limited set of questions, and is not readily separable from the messier worlds of politics and economics.[218]

---

[218] *See* John M. Conley, *The Social Science of Ideology and the Ideology of Social Science*, 72 N.C. L. REV. 1249, 1250-52 (1994).

Judge Keady's willingness to subordinate science to what he viewed as higher truths and values also foreshadowed a trend within science itself. For some scientists, as science learns more and more about less and less, the result is a growing sense of inadequacy, of newfound respect for what is not known and perhaps cannot be known. Two recent books from very different branches of science, and from the polar extremes of the spiritual-material continuum, illustrate the point.

John Polkinghorne is an accomplished theoretical physicist who is also an Anglican priest (his book jacket describes him as the only ordained member of Newton's Royal Society). His book *Belief in God in an Age of Science*[219] is one of several recent efforts to reconcile physics and theology. Most pertinent to our purposes are his comments on the limitations of science. He spends a great deal of time on the fundamental cosmological dilemma—the monstrous improbability of the evolution of a universe that would produce conscious life:

> What we have come to understand is that if this [evolutionary] process is to be fruitful on a cosmic scale, then necessity has to take a very specific, carefully prescribed form. Any old world will not do. Most universes that we can imagine would prove boring and sterile in their development, however long their history were to be subjected to the interplay of chance with their specific form of lawful necessity. It is a particular kind of universe which alone is capable of producing systems of the complexity sufficient to sustain conscious life.[220]

Polkinghorne reviews various efforts to account for this improbable turn of events, including many-worlds quantum theory, the breaking of symmetry, and the idea that "a physical process called inflation blows up microworlds."[221] Finally, he concludes, a point is reached beyond which

> speculation becomes rapidly more rash and more desperate. Maybe, the laws of nature themselves fluctuate, so that a vast

---

[219] JOHN POLKINGHORNE, BELIEF IN GOD IN AN AGE OF SCIENCE (1998).

[220] *Id.* at 6.

[221] *Id.* at 8-9.

> portfolio of conceivable, or (to us) inconceivable, worlds rise and fall in the relentless exploration of random possibility—occasional patches of transient order in a sea of seething chaos.[222]

By now, however, "[w]e have moved far beyond anything that could be called scientific in this exercise of prodigal conjecture."[223] For the religious Polkinghorne, the only reasonable alternative is the belief "that there is a divine purpose behind this fruitful universe, whose fifteen-billion-year history has turned a ball of energy into the home of saints and scientists."[224]

Edward O. Wilson's *Consilience* is also a search for intrinsic order in life and the cosmos, but a search that leads in a different direction.[225] Wilson is best known as the father of sociobiology, the controversial theory that holds that social behavior, including that of human beings, must be understood in terms of natural selection operating at the genetic level. Its ultimate objective is thus to supersede such behavioral disciplines as sociology and anthropology, replacing them with a "biologicized" social science "in which each [social] phenomenon is weighed for its adaptive significance and then related to the basic principles of population genetics."[226]

Wilson's biological materialism could not be further from Polkinghorne's spirituality. But their concerns about the shortcomings of contemporary science have much in common, meeting back-to-back, as it were. Wilson is concerned with atomization, a breakdown in linkages between the natural sciences on the one side and the social sciences and humanities on the other, as well as within each of these major intellectual enterprises.[227] Natural scientists, he argues, "are professionally focused; their education does not orient them to the wide contours of the world. . . . The most productive scientists, installed in million-dollar laboratories, have no time to think about the big picture and see little profit in it."[228] In the social sciences and humanities, "[t]o be an original scholar is to be a highly specialized world authority in a polyglot Calcutta of similarly focused world authorities."[229] (Wilson's general point is self-evidently true, but he cannot resist hyperbolic polemics, as when he says that it is "not surprising to find physicists who do not know what a gene is."[230] Has anyone ever met a physicist, or even a *lawyer*, who did not know what a gene is?)

---

[222] *Id.*

[223] *Id.*

[224] *Id.*

[225] EDWARD O. WILSON, CONSILIENCE: THE UNITY OF KNOWLEDGE (1998).

[226] EDWARD O. WILSON, SOCIOBIOLOGY: THE NEW SYNTHESIS 4 (1975).

[227] *Id.* at 39.

Wilson's solution is *consilience*. His subtitle defines it as "the unity of knowledge"; elsewhere he characterizes it as "literally a 'jumping together' of knowledge by the linking of facts and fact-based theory across disciplines to create a common groundwork of explanation."[231] It will come as no surprise to those familiar with Wilson's work that biology will be the queen bee in the consilient intellectual hive. Just as the Freudian theory of dreams has yielded to the insights of neuroscience,[232] sociology and anthropology will merge into the study of "gene-culture coevolution."[233] Even Polkinghorne's faith will ultimately be shown to have Darwinian origins.[234]

We do not mean to ridicule Wilson's point of view. *Consilience* is an elegant book, and Wilson is a great scientist. While we do not share his fundamental materialism, we believe that many of his specific arguments are right. Our point, rather, is to show that disparate elements of the scientific community share a desire for greater coherence within the sciences and for stronger linkages with other traditions of thought and analysis. Judge Keady would not have had the arrogance to hold himself out as a philosopher of science. But his feelings about the place of science in the world seem to have been very similar; with apologies to Moliere, he was a philosopher in spite of himself. His philosophy, just like his handling of scientific evidence, was well ahead of its time.

---

[228] *Id.*

[229] *Id.*

[230] *Id.*

[231] *Id.* at 8.

[232] *Id.* at 74-76.

[233] *Id.* at 127-28.

[234] *Id.* at 264-65.

RACE, REDISTRICTING AND RETROGRESSION IN MISSISSIPPI AFTER THE 2000 CENSUS

Frederick G. Slabach[*]

I. INTRODUCTION

The State of Mississippi may lose one of its five United States Congressional districts following the 2000 federal census as a result of national population shifts.[1] The Mississippi Legislature will be required to redraw the remaining four Congressional district lines prior to the Congressional elections of 2002[2] to meet population equality[3] and racial fairness[4] standards established by the United States Constitution and federal statutes. In so doing, the legislature will be required to take into account several major new United States Supreme Court cases expounding upon the intersection of the

---

[*] Frederick G. Slabach is the Associate Dean of Whittier Law School in Costa Mesa, California. He served as Law Clerk to William C. Keady, former Chief Judge of the federal district court for the Northern District of Mississippi; as Legislative Counsel to former U.S. Senator John C. Stennis; as Associate Dean of Mississippi College School of Law; and as Assistant Secretary of the United States Department of Agriculture. The author wishes to thank his brother, Don Slabach, for suggesting the idea for this article and for providing the census data analysis projecting Mississippi's loss of a congressional seat. The author also wishes to thank Linda D. Martin (Whittier Law School Class of 1999) for excellent research and editing support under a very tight deadline.

[1] Don E. Slabach, *2000 Reapportionment and Its Effects*, 2 STENNIS INST. OF GOV'T POL. BRIEF 1 (1997).

[2] U.S. CONST. art. I, § 2 (stating that Representatives are to be apportioned among the States).

[3] Wesberry v. Sanders, 376 U.S. 1, 6-7 (1964) (holding that substantially equal population standard applies to U.S. Congressional Districts).

[4] Thornburg v. Gingles, 478 U.S. 30, 56 (1986) (holding that whether racially polarized voting in district is legally significant requires inquiry into minority and white voting practices).

Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment. As a part of that analysis, the legislature must determine which preexisting Congressional district lines to use as a benchmark to avoid a retrogression of the electoral position of minority voters in Mississippi.[5] A close reading of the cases and the Voting Rights Act indicates that the legislature must maintain one majority-minority Congressional district in Mississippi after the 2000 federal census. The correct benchmark for the retrogression analysis was created by a 1984 federal district court order.[6]

II. THE VOTING RIGHTS ACT AND RETROGRESSION

Any discussion on Congressional redistricting in Mississippi begins with sections 2 and 5 of the Voting Rights Act of 1965, as amended in 1982.[7]

A. Section 5

Section 2 of the Act applies to all jurisdictions and prohibits any voting procedure that results in members of a protected racial minority having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[8] Section 5 of the Act applies only to certain jurisdictions with particularly egregious histories of disenfranchisement[9] and is intended to ensure that the protections afforded by section 2 of the Act are in fact available in the states covered by the procedural mechanisms of section 5.[10] Mississippi is covered by section 5.[11]

---

[5] *See* Beer v. United States, 425 U.S. 130, 141 (1976) (stating that purpose of section 5 is to guarantee that voting procedure changes do not result in retrogression in ability of racial minorities to effectively exercise their electoral franchise).

[6] *See* Jordan v. Winter, 604 F. Supp. 807, 815 (N.D. Miss. 1984) (per curiam) (providing 52.83% black majority of voting age population in one of five Congressional districts to remedy dilution of black voting strength).

[7] 42 U.S.C. §§ 1973-1973c (1994). Congress adopted the Voting Rights Act of 1965 to protect minority voting. Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 827 (1994). The debate over the Act focused primarily on barriers to registration and fraud and intimidation at polling places. *Id.* Under section 2 of the Act the state must prove that new districts will not result in a retrogression of minority voting strength under section 5 of the Voting Rights Act. 42 U.S.C. § 1973. Whether districts which satisfy section 5, and are precleared by the U.S. Department of Justice or the federal district court for the District of Columbia, might successfully be challenged under section 2 is beyond the scope of this article. *Cf. infra* notes 18-24 and accompanying text.

[8] 42 U.S.C. § 1973 (1994). This language has been interpreted as requiring

1. *Procedure*

Section 5 requires that any proposed change in law affecting voting in covered jurisdictions, including redistricting plans, must be precleared by the United States Attorney General, or authorized by a declaratory judgment of a three-judge panel of the United States District Court for the District of Columbia, before the change can be implemented.[12] The purpose of preclearance is to prevent states from replacing old disenfranchising procedures with new ones.[13] The submitting

---

more than the mere absence of practices and procedures designed to keep minorities from voting; the law also prohibits practices and procedures that dilute votes so as to prevent minorities from electing candidates of their choice. *See, e.g.*, United States v. Mississippi, 256 F. Supp. 344, 348 (S.D. Miss. 1966) (stating that purpose of Voting Rights Act was to guarantee full exercise of right to vote, not just registration). The Court first recognized dilution claims under the Act in *Allen v. State Board of Elections*, a section 5 preclearance case. *See* Allen v. State Bd. Of Elections, 393 U.S. 544, 572 (1969) (stating that section 5 coverage questions involved issues of first impression). The Court adapted the Fifteenth Amendment concept of vote dilution to claims under the Act, stating that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Id.* at 568-69 (citing Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[9] Originally, covered jurisdictions were defined as:

> any State or . . . any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 438 (codified as amended at 42 U.S.C. §1973b(b) (1988)).

[10] 42 U.S.C. § 1973c (1994).

[11] 28 C.F.R. app. pt. 51 (1997).

[12] 42 U.S.C. § 1973c (1994).

[13] *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 157

jurisdiction has the burden of proving that the change does not lead to a retrogression in the position of racial minorities,[14] is free of a discriminatory purpose,[15] and even if the proposed change enhances the position of racial minorities (i.e., it is "ameliorative"), that the change does not dilute minority voting strength[16] as prohibited by the United States Constitution.[17]

2. *Incorporation of Section 2*

Whether the minority vote dilution standard of section 2 is incorporated into the nonretrogression standard of section 5 has been hotly debated. Prior to the 1982 amendments to section 2 of the Act, the Court had interpreted section 5 to require preclearance if the change in election procedures resulted in an effect on minority voting rights no worse than the procedure it replaced.[18] An "ameliorative" change could not

---

(1977) (finding that Act's goal was to prevent use of new procedures until capacity for discrimination had been examined); South Carolina v. Katzenbach, 383 U.S. 301, 335 (1966) (finding that Congress wanted to prevent states from evading remedies for voting discrimination contained in Act).

[14] Beer v. United States, 425 U.S. 130, 141 (1976). In *Beer*, the Court interpreted section 5 of the Act to prohibit implementation of changes in election laws that, by their purpose or effect, "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141. *See also* City of Lockhart v. United States, 460 U.S. 125, 133-36 (1983) (applying *Beer* nonretrogression standard).

[15] City of Richmond v. United States, 422 U.S. 358, 362 (1975) (stating issue before Court was to determine whether City had proven that land annexation did not have purpose or effect of denying racial minority right to vote).

[16] The concept of minority vote dilution originated in Fifteenth Amendment cases and was incorporated into Voting Rights Act jurisprudence. *See* Slabach, *supra* note 7 and accompanying text. The concept of vote dilution is that some voting systems that comply with the one-person, one-vote requirement of the Fourteenth Amendment nevertheless dilute the votes of some groups, and this dilution undermines the equality of the franchise for the members of that group. *See* Larry Alexander, *Still Lost in the Political Thicket (or Why I Don't Understand the Concept of Vote Dilution)*, 50 VAND L. REV. 327, 328 (1997) (arguing that beyond "one person, one vote" there exists no normative principle that can be used to measure vote dilution).

[17] *Beer*, 425 U.S. at 141 (stating that ameliorative apportionment must not discriminate on basis of race so as to violate Constitution).

[18] *Id.* (maintaining that ameliorative apportionment "can hardly have the

be denied preclearance even if the change itself diluted minority voting strength under section 2.[19] Under this scheme, plaintiffs could not block a change from going into effect through the Department of Justice or the federal district court for the District of Columbia under section 5 but were required to sue in federal court under section 2.[20] The legislative history of the 1982 amendments[21] to the Act attempted to alter the standard of review under section 5 to require the Attorney General to deny preclearance "if a new voting procedure itself so discriminates as to violate section 2."[22] Congress clearly

---

'effect' of diluting, or abridging the right to vote on account of race within the meaning of § 5.").

[19] *City of Lockhart,* 460 U.S. at 134 (holding that voting procedure change did not increase degree of discrimination against blacks entitled to section 5 preclearance).

[20] *Id.*

[21] In response to *City of Mobile v. Bolden,* 446 U.S. 55 (1980) (holding that plaintiffs must prove intent to discriminate against minorities), Congress amended the Act to make clear that section 2 does not require proof of discriminatory purpose or intent. S. REP. NO. 97-417, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 179. The language of the amended Act is as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] *in a manner which results in a denial or abridgment of* the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), *as provided in subsection (b).*
>
> *(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, 134 (1982) (pre-1982 language deleted by 1982 amendment is in brackets, while new language is italicized).

[22] S. REP. NO. 97-417, at 12 n.31 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 189 n.31.

intended that the Attorney General or the federal district court for the District of Columbia should deny section 5 preclearance if a change violated the vote dilution standard of section 2, and even if it was not a "retrogression" under *Beer*.[23] However, contrary to Congress's clear intent, the United States Supreme Court rejected the idea that a violation of section 2 automatically required denial of preclearance under section 5.[24]

3. *Burden of Proof*

If the Mississippi congressional delegation is reduced from five to four following the 2000 federal census, the legislature must draw the district lines in such a way as to meet this burden of proof. The legislature must take care to adopt district lines which do not have the purpose or effect of leading to a "retrogression" in the position of racial minorities under section 5. That is, the electoral position after redistricting (the ability of minorities to elect candidates of their choice) may not be diminished and may not result in vote dilution under the Constitution.[25]

---

[23] *See* 28 C.F.R. § 51.55(b)(2) (1997) (providing that Attorney General shall withhold section 5 preclearance if change would clearly violate section 2); *see also* Slabach, *supra* note 8, at 873-74; Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 158-62 (1984) (noting that incorporating section 2 into section 5 will "return section 5 to its proper role as an agent for the elimination rather than the perpetuation of racial vote dilution."); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1473 (1996) (noting that incorporation of section 2 standard into section 5 needed to effectuate broad remedial purpose of Voting Rights Act). *But see* Recent Case, 109 HARV. L. REV. 681, 686 (1996) (noting that incorporation of section 2 into section 5 would exacerbate "serious and unwarranted federalism costs" to states).

[24] *See* Reno v. Bossier Parish School Bd., 117 S. Ct. 1491, 1500 (1997) (violation of section 2 not in and of itself violation of section 5 but can be used as evidence of discriminatory purpose as part of section 5 inquiry).

[25] *See* Beer v. United States, 425 U.S. 130, 141 (1976) (determining whether ability of minority groups to participate in political process and to elect their choices to office is diminished by change in voting procedure).

4. *Status Quo*

Mississippi currently has one congressional district, the second district, with an African-American voting age majority.[26] The district was first given a black voting age population majority in 1984 in a per curiam opinion entered by a three-judge federal district court comprised of Charles Clark, Chief Judge of the Fifth Circuit Court of Appeals; William C. Keady, Senior Judge of the Northern District of Mississippi; and L.T. Senter, Chief Judge of the Northern District of Mississippi.[27] The Mississippi Legislature modified the district lines in 1991, increasing the African-American voting age population to 58%.[28]

B. Cataloging Retrogression Decisions

If Mississippi loses one congressional district after the 2000 federal census, the Mississippi Legislature will be required to redraw the lines for the remaining Congressional districts so as not to result in a retrogression of the electoral position of African-American voters. Unfortunately, the courts have merely repeated the retrogression language from *Beer* without extensive analysis of what constitutes a retrogression. The Supreme Court typically states simple conclusions as to whether or not a change is a retrogression. Why a change does or does not constitute a retrogression is unclear.[29] Justice

---

[26] MISS. CODE ANN. § 23-15-1037 (Supp. 1998).

[27] Jordan v. Winter, 604 F. Supp. 807, 810-15 (N.D. Miss. 1984) (increasing African-American voting age population of district from 48.05% to 52.83%). An earlier court decision had given the district a 48.05% black voting age population. Jordan v. Winter, 541 F. Supp. 1135, 1144 (N.D. Miss. 1982) (creating "delta district" with 53.77% African-American population but only 48.05% voting age population), *vacated and remanded* in light of the 1982 amendments to the Voting Rights Act, Brooks v. Winter, 461 U.S. 921, 921 (1983).

[28] MISS. CODE ANN. § 23-15-1037 (Supp. 1998). *See also* Paul Barton, *Espy Success Fails to Turn Blacks From Remap Goal*, COMMERCIAL APPEAL, December 25, 1991, at A1 (stating that Mississippi Legislature increased black voting age population in second district to 58%).

[29] The Court did make clear that the retrogression language was itself an effort to interpret the statutory language, not to interpret the Constitution. Beer v. United States, 425 U.S. 130, 139 (1976). Thus, Congress could alter the stan-

Kennedy, writing for the plurality in *Holder v. Hall*,[30] acknowledged the "difficulty in determining whether a proposed change would cause retrogression."[31]

Justice Stewart's opinion for the majority in *Beer v. United States* announced that the purpose of section 5 was to ensure that "no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."[32] The Court went on to explain that a change which enhances the electoral position (an "ameliorative" plan) is not retrogressive and, therefore, may not be denied preclearance under section 5.[33] The Court did not, however, define these two terms, retrogressive and ameliorative. One might assume the Court believed the terms are self-explanatory or that recourse could easily be made to standard dictionary definitions.[34]

The Court's application of the *Beer* retrogression language illustrates the difficulty of identifying a normative principle or an articulable standard. In fact, the Court has not attempted to do so; it has been content to make case-by-case determinations and conclusory statements. The net result is that Justice Stewart's opinion in *Beer* has done for the Voting Rights Act what his concurring opinion in *Jacobellis v. Ohio*[35] did for "hard core pornography"—the Court simply knows it when it

---

dard by altering the language of the Voting Rights Act.

[30] 512 U.S. 874 (1994).

[31] *Holder*, 512 U.S. at 883-84.

[32] *Beer*, 425 U.S. at 141.

[33] *Id.* at 141-42.

[34] "Retrogress" has been defined as to return to an earlier, inferior, or less complex condition; to go or move backward. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (3d ed. 1992). "Ameliorate" has been defined as to make or become better; improve. *Id.* at 59.

[35] 378 U.S. 184 (1964). Justice Stewart famously said:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But, I know it when I see it, and the motion picture involved in this case is not that.

Id. at 197.

sees it. So little attempt has been made by the Court to articulate a definition or standard of retrogression that we can only catalog what is retrogressive and what is not.

1. *Measuring Retrogression When the Number of Election Districts Remains the Same*

In *Beer*, the Court considered a change in the election districts for the New Orleans, Louisiana City Council.[36] The Court noted that under the old plan, none of the five council districts had a clear African-American majority, and no African-Americans had been elected.[37] Under the plan for which preclearance had been sought, two of the five districts contained an African-American population majority, and one of the two had an African-American registration majority.[38] Because the proposed plan created the possibility of two majority-minority districts and the old plan had none, the new plan was "ameliorative," not retrogressive, and thus preclearance could not be denied.[39]

Thus, when the total number of election districts remain the same, and the number of majority-minority districts *increases*, a plan is not retrogressive.[40] If the total number of election districts remain the same, and the number of majority-minority districts *decreases*, one would assume the new plan is retrogressive, in that the opportunity of minorities to elect candidates of their choice is diminished.[41] If the number of election districts remains the same, and the number of majority-minority districts remains the same, the new plan is not retrogressive. This is true even though the old plan itself might have illegally diluted minority voting strength under section 2 the Voting Rights Act.[42]

---

[36] Beer v. United States, 425 U.S. 130, 134-38 (1976).

[37] *Id.* at 141-42.

[38] *Id.* at 142.

[39] *Id.* at 141-42.

[40] *See* Jack Quinn, et al., *Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act*, 1 GEO. MASON U. CIV. RTS. L.J. 207, 235 (1990).

[41] *See* Bush v. Vera, 517 U.S. 952, 983 (1996) (holding that nonretrogression "mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly").

2. *Measuring Retrogression When the Number of Election Districts Increases*

If the total number of election districts increases, one might assume that the number of majority-minority districts must increase in sufficient numbers to maintain the same percentage of majority-minority districts compared to the total population. However, the Court has rejected this definition of retrogression.[43] In *Abrams v. Johnson*, Georgia's Congressional delegation increased from ten to eleven following the 1990 census.[44] The Court rejected the contention that a new court-ordered plan which maintained one majority-minority district (the same number of such districts as existed before the 1990 census) was retrogressive.[45] The Court focused upon the black voting age population within each district rather than the number of majority-minority districts.[46] The Court concluded that the fact that the percentage of majority-minority districts fell from 10% (1 in 10) to 9.09% (1 in 11) did not result in "black voters in any particular district suffer[ing] a retrogression in their voting strength."[47] The Court stated that if the percentage of majority-minority districts must remain the same when the total number of districts increased, "each time a state with a majority-minority district was allowed to add one new district because of population growth, it would have to be majority-minority. This the Voting Rights

---

[42] *See* Reno v. Bossier Parish Sch. Bd., 117 S. Ct. at 1491, 1498-1500 (1997) (finding that where old and new plan for school board districts maintained zero majority-minority, new plan not retrogressive).

[43] *See* Abrams v. Johnson, 117 S. Ct. 1925, 1935, 1938-49 (1997) (rejecting position that increase in number of districts requires increase in number of majority-minority districts).

[44] *Abrams*, 117 S. Ct. at 1930.

[45] *Id.* at 1935.

[46] *Id.* at 1939.

[47] *Id.*

Act does not require."[48] Indeed, in an earlier review of the same Georgia Congressional redistricting case, the Court seems to have held that anytime the number of majority-minority election districts increases, the new plan is by definition "ameliorative."[49] The Court reached the same conclusion in *Shaw v. Hunt.*[50]

3. *Measuring Retrogression When the Minority Population Within a District Changes*

Likewise if the minority population within a district increases, a plan is ameliorative, not retrogressive.[51] One could assume that the converse is true: a decrease in the African-American population of election districts is retrogressive.[52]

---

[48] *Id.* As to why this is so, the Court volunteered nothing.

[49] *See* Miller v. Johnson, 515 U.S. 900, 923 (1995) (stating that ameliorative is "a term we have used to describe plans increasing the number of majority-minority districts").

[50] 517 U.S. 899 (1996). The Court stated that North Carolina's plan to create the first majority-minority district, after the 1990 census increased the total number of Congressional districts from 11 to 12, "indisputably was ameliorative," apparently relying on the simple math truism that one is more than zero. *Shaw,* 517 U.S. at 912.

[51] In *Bush v. Vera,* 517 U.S. 952, 957 (1996), the Texas legislature adopted a redistricting plan to create three majority-minority districts. One of the districts (number 18) had a 40.8% black population before the 1990 census and a 50.9% black population in the new plan. *Bush,* 517 U.S. at 983. The State argued that this 50.9% black population district was necessary to comply with section 5 of the Act. *Id.* The Court determined that the increase from 40.8% black population to 50.9% was "not maintenance, but substantial augmentation, of the African-American population percentage" and that "the State has shown no basis for concluding that the increase to a 50.9% African-American population in 1991 was necessary to ensure nonretrogression." *Id.*

[52] *See* City of Rome v. United States 446 U.S. 156, 185 (1980) (stating that annexation which reduced percentage of minority voters in city commission districts is retrogression consistent with Court's holding in *Beer*). *But see* United States v. Mississippi, 444 U.S. 1050, 1057-59 (1980) (Marshall, J., dissenting) (disagreeing with Court's affirmance of lower court preclearance of legislative redistricting plan in which individual majority-minority legislative districts lost African-American population); Richmond v. United States, 422 U.S. 358, 370-71 (1975) (stating that annexation that reduces percentage of blacks in population is not retrogressive where post-annexation districts fairly reflect current black voting strength).

C. *The Analytical Framework for Retrogression*

From these cryptic conclusions, it may be possible to piece together an analytical framework to determine when a redistricting change is retrogressive. First, retrogression refers to "*effective* exercise of the electoral franchise."[53] The Court has described retrogression in effective exercise of the electoral franchise as a "dilut[ion of] the effectiveness of the Negro vote"[54] or a "dilut[ion of] Negro voting strength."[55] In *Bush v. Vera*,[56] the Court explained that nonretrogression "mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly, by the State's actions."[57] The Court's use of the "minority vote dilution" language is consistent with the language in a long line of section 5 and section 2 cases in which the courts developed a standard that finds a violation of the Act if an election practice prevents minorities from electing candidates of their choice.[58] The Court has noted that in vote dilution cases, the law requires a searching, fact-based analysis of whether members of racial minorities have the opportunity to elect representatives of their choice.[59] The Court has held that to prevail in Congressional districting vote dilution cases, a minority group must demonstrate (1) "that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "that it is politically cohesive," and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[60]

---

[53] Beer v. United States, 425 U.S. 130, 141 (1976) (emphasis added). *See also* City of Lockhart v. United States, 460 U.S. 125, 133-36 (1983) (applying *Beer* nonretrogression standard).

[54] *Rome*, 446 U.S. at 183.

[55] *Id.* The Court recognized that racial bloc voting could present an opportunity for minority representation. *Id.*

[56] 517 U.S. 952 (1996).

[57] *Bush*, 517 U.S. at 983. The Court stated nonretrogression was not an excuse for the State to "ensure continued electoral success." *Id.*

[58] *See* Reno v. Bossier Parish Sch. Bd., 117 S. Ct. 1491, 1498 (1997) (stating that violation of section 2 occurs when voting practices minimize minority voting strength); Holder v. Hall, 512 U.S. 874, 880 (1994) (determining that comparison between acceptable voting system and existing voting system which reveals minority voter's right to elect their chosen representative violates section 2); Thornburg v. Gingles, 478 U.S. 30, 66 (1986) (noting ability of minorities to elect officials of their choice is important factor in evaluating possible section 2 violation); United States v. Marengo County Comm'n, 731 F.2d 1546, 1565 (1984) (stating equal right of minorities to participate in political process is fundamental to section 2 analysis); *see also* Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969) (adopting Fifteenth Amendment concept of vote dilution to claims under Voting Rights Act in section 5 preclearance case).

Read together, the retrogression and vote dilution concepts would require a finding of retrogression, if under a new redistricting plan, minority voters had less opportunity to elect representatives of their choice than under the status quo. This is true whether one considers the total number of majority-minority districts, the minority voting age population of a particular district, or some other practice or procedure (such as majority run-off requirements or multi-member districts). Thus, if under the existing election districting plan, African-Americans have an "effective voting majority"[61] in one district, failure to maintain one majority-minority district would be a retrogression in the minority group's opportunity to elect representatives of their choice if (1) the minority group remains "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) is politically cohesive, and (3) white majority bloc voting defeats the minority preferred candidate.[62]

This analysis would be the same whether the total number of congressional districts remains the same, increases or decreases. Using this analytical framework for retrogression, if Mississippi maintains five Congressional districts after the

---

[59] *Thornburg*, 478 U.S. at 45, 66 (evaluating section 2 in vote dilution case).

[60] *Id.* at 50-51. While the vote dilution test articulated here was developed in a section 2 challenge, it must also be used in a section 5 retrogression analysis if the "benchmark" to which the new districting plan must be compared was created by applying a section 2 vote dilution analysis. *See infra* notes 89-98 and accompanying text.

[61] Johnson v. DeGrandy, 512 U.S. 997, 1014 (1994).

[62] *See Thornburg*, 478 U.S. at 50-51. The Court held the threshold to determine whether retrogression has occurred is size, compactness, cohesiveness, and bloc voting. *Id. See Bush*, 517 U.S. at 978 (stating test is opportunity of minorities to elect representatives of choice).

2000 census, it must maintain one majority-minority district if a geographically compact majority-minority district can be drawn.[63] Likewise, if Mississippi loses one Congressional district, it must maintain one majority-minority district if a geographically compact majority-minority district can be drawn. A reduction from one majority-minority district would be a dilution of the existing opportunity of African-Americans to elect a representative of their choice.[64] Such a redistricting plan would be rejected for violation of the nonretrogression principle of section 5 of the Act.[65]

III. Equal Protection Clause

Prior to 1995 a state legislature, under section 5, could fashion new district lines focusing explicitly on the racial fairness requirements of the Voting Rights Act.[66] Recent Supreme Court decisions, though, involving apportionment of majority-minority Congressional districts in North Carolina,[67] Georgia,[68] and Texas[69] have complicated the work of legislatures in these states by pitting the goals of the Voting Rights Act against those of the Equal Protection Clause of the Fourteenth Amendment.[70] In these cases, a majority of the Court has held that white plaintiffs challenging[71] election districts which were drawn in such a way as to subordinate traditional districting principles (such as compactness and regularity) to the predominant factor of race, would state a claim for violation of the Equal Protection Clause of the Fourteenth Amendment.[72] In order to prevail against such a claim, traditional Equal Protection Clause analysis[73] requires the dis-

---

[63] This assumes continuation of the political cohesiveness of African-American voters and racial bloc voting found by the court to exist in 1984. Jordan v. Winter, 604 F. Supp. 807, 810-14 (N.D. Miss. 1984) (stating blacks consistently lose elections in Mississippi because majority of voters choose their preferred candidates on basis of race, and this racial bloc voting operates to dilute black voting strength in districts where blacks constitute minority of voting age population).

[64] The fact that a change from one majority-minority district out of five to one majority-minority district out of four increases the percentage of majority-minority districts from 20% to 25% does not make the plan "ameliorative." *See* Abrams v. Johnson, 117 S. Ct. 1925, 1940-41 (1997) (reduction from one in ten [10%] to one in eleven [9.09%] not retrogressive since one majority-minority district was included in old as well as new plan).

[65] *See* Beer v. United States, 425 U.S. 130, 141 (1976) (stating if ability of minority to elect representatives of their choice is diminished, retrogression exists and such plan should be rejected); *see also* City of Lockhart v. United States, 460 U.S. 125, 133-36 (1983) (applying *Beer* nonretrogression standard).

[66] *See* Quinn et al., *supra* note 40; *see also* Mark S. Nagel, *Constitutional Limits on Racial Redistricting*: Miller v. Johnson, 115 S. Ct. 2475 (1995), 19 HARV. J.L. & PUB. POL'Y 188, 189-91 (1995) (discussing Supreme Court's racial redistricting rulings).

[67] Shaw v. Hunt, 517 U.S. 899, 912 (1996).

[68] Miller v. Johnson, 515 U.S. 900, 945-47 (1995). *See also* Abrams v. Johnson, 117 S. Ct. 1925, 1928-29 (1997) (affirming district court's redistricting plan after

---

remand of *Miller*).

[69] Bush v. Vera, 517 U.S. 952, 977 (1996). However, the Court did recognize that the State was limited in furthering such interests. *Id.*

[70] As Justice Stevens noted in his dissent in *Bush,* "States may find it extremely difficult to avoid litigation flowing from decennial redistricting. On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny." *Bush,* 517 U.S. at 1037 (Stevens, J., dissenting).

[71] An interesting debate involving the standing of white voters to challenge majority-minority districts has developed at the Court and among commentators. *See, e.g., Shaw,* 517 U.S. at 918-20 (Stevens, J., dissenting) (holding no individual burdened more than any other); Shaw v. Reno, 509 U.S. 630, 659 (1993) (White, J., dissenting) (noting white voters are not injured in cognizable way by majority-minority districts); John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders,* 111 HARV. L. REV. 576, 585 (stating that white voters are injured by being intentionally assigned to majority-minority district because it is known white voter's vote will not count there); Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims,* 1 MICH. J. RACE & L. 47, 68 (1996) (stating that white plaintiffs in racial gerrymandering claims do not suffer particularized harm); Pamela S. Karlan, *Still Hazy After All these Years: Voting Rights in the Post-Shaw Era,* 26 CUMB. L. REV. 304-05 (1996) (stating that race-conscious districting does not involve discrimination against white voters).

[72] *Shaw,* 517 U.S. at 904. All laws that classify citizens on the basis of race are constitutionally suspect. *Id.*

[73] Critics of this "racial gerrymandering" line of cases argue that the majority of the Court is not applying a traditional Equal Protection Clause analysis. These critics argue that the Equal Protection Clause is concerned only with state action that has the purpose and effect of singling out certain groups of persons for special benefits or burdens. The Equal Protection Clause does not concern itself with state action which simply deals with groups of persons on the basis of race when doing so does not result in their being singled out for a special disadvantage because of their race. The racial gerrymandering cases of the 1990s considered state action that was undeniably race-conscious but did not visit special disadvan-

tricts to withstand "strict scrutiny"; namely, that the election districts drawn with race as the predominant factor were "narrowly tailored" to comply with a "compelling state interest."[74]

A. Compelling State Interest

Using this standard of review, a state covered by section 5 of the Voting Rights Act might be expected to argue that the Voting Rights Act *requires* the creation or maintenance of majority-minority districts.[75] This might be because the Act prohibits any apportionment plan which would result in dilution of minority voting strength under section 2[76] or because the Act prohibits any apportionment plan which constitutes "retrogression" in the position of minorities under section 5.[77] The Court has not ruled definitively on the issue of whether compliance with the Voting Rights Act is a compelling state interest.[78]

In the North Carolina case, for example, the state made

---

tage on the white plaintiffs. *See* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 246 n.6, 311-37 (1997) (noting that six Justices of Supreme Court, only four of whom have served at same time, have argued this position in dissent).

[74] *Shaw*, 517 U.S. at 908. Some commentators have gone so far as to project that this line of cases could "strike down altogether section 2 of the Voting Rights Act under the Fourteenth Amendment." James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 896 (1997).

[75] *See Shaw*, 517 U.S. at 908 (noting State of Texas argued that compliance with Voting Rights Act is compelling state interest).

[76] *Id.* Drawing racial distinctions must meet a compelling State interest. *Id.*

[77] *Id.* at 912. The Court supported North Carolina's decision not to create two majority-minority districts. *Id.*

[78] In several recent cases, the Court has assumed without deciding that compliance with the Act could be a compelling state interest. *See, e.g.*, *Bush*, 517 U.S. at 977 (holding State must have "strong basis in evidence" that creating majority/minority district is reasonably necessary to comply with section 2); *Shaw*, 517 U.S. at 915 (holding requirements of proof necessary to sustain equal protection challenge); *Miller*, 515 U.S. at 920 (noting there is significant state interest in eradicating effects of past racial discrimination); Growe v. Ernison, 507 U.S. 25, 37-42 (1993) (holding redistricting plan to bar use of fragmented districts constituted compelling government interest).

the argument that the challenged majority-minority districts were created to accomplish a compelling state interest: compliance with the Act.[79] In that case, the Department of Justice had rejected an earlier apportionment plan under section 5 of the Act, and the State created an additional majority-minority district to receive preclearance.[80] The Court sidestepped the issue of whether compliance with the Act is a compelling state interest by stating that the Department of Justice erred in this particular case by rejecting the earlier plan.[81]

A majority of the Court, however, now appears to agree that compliance with the Voting Rights Act is a compelling state interest. Justice O'Connor's separate concurring opinion,[82] along with the four dissenting Justices' opinions[83] in *Bush v. Vera*, each support the general proposition that compliance with the Act is a compelling state interest.

B. Narrow Tailoring

Articulating a compelling state interest is only the first step, however, in determining whether race-conscious districting passes constitutional muster. Particular districting decisions must be narrowly tailored to meet the compelling state interest. Whether particular election districts are narrowly tailored will be determined on a case-by-case basis.

In Mississippi, the Act's nonretrogression principle would require that the state maintain at least one majority-minority district.[84] Complying with the nonretrogression principle would be the state's compelling interest in creating an election district using race as a predominant factor. The court would then determine whether the particular majority-minority district created was narrowly tailored to meet this compelling state interest.[85] The key question to be answered is whether the state's use of race is limited to that essential to comply with the nonretrogression principle; in other words, is it narrowly tailored?[86]

---

[79] *Shaw*, 517 U.S. at 908. Another interest was to eradicate effects of past and present discrimination. *Id.*

[80] *Id.* at 912. North Carolina's first plan created one of the first majority black districts. *Id.*

[81] *Id.* at 912-13. The Court recognized the apportionment could not violate section 5 unless its discrimination on the basis of race and color violated the Constitution. *Id.* at 912.

[82] *Bush*, 517 U.S. at 990-94 (O'Connor, J., concurring). Justice O'Connor wrote that a compelling state interest, however, is not necessarily an assumption. *Id.* (O'Connor, J., concurring).

[83] *Id.* at 1003 (Stevens, J., dissenting); *id.* at 1045 (Souter, J., dissenting). The Court delivered two separate dissenting opinions with which Justices Ginsburg and Breyer joined. *Id.* at 1003-44 (Stevens, J., dissenting); *id.* at 1045-77 (Souter, J., dissenting).

1. *Increasing Minority Voting Potential*

Clearly, the legislature could not increase the minority voting age population of the Second Congressional District after the 2000 census in order to "maximize" minority voting potential and claim section 5 of the Act as the compelling government interest. This "maximization" policy allegedly developed by the Department of Justice in section 5 review cases has been rejected by the Court; it is not required by the Voting Rights Act and violative of the Equal Protection Clause.[87] If the legislature attempted to "maximize" minority voting potential, the redistricting plan would not be narrowly tailored to meet the state's compelling interest in complying with the Voting Rights Act since "maximization" is not required by the Act.[88]

---

[84] *See supra* notes 30-66 and accompanying text.

[85] *Bush*, 517 U.S. at 977. The Court rejected the view that "a district must have the least possible amount of irregularity in shape, making allowances for traditional districting criteria." *Id.*

[86] *Id.* at 983. The Court noted that nonretrogression was not a license "for the State to do whatever it deems necessary to ensure continued electoral success." *Id.*

[87] *See* Shaw v. Hunt, 517 U.S. 899, 911 (1996) (rejecting Department of Justice "maximization" principle); *see also* Miller v. Johnson, 515 U.S. 900, 921-25 (1995) (rejecting contention that state has compelling interest in complying with all Justice Department mandates).

[88] *Shaw*, 517 U.S. at 911.

2. *Retrogression—The 1984 Benchmark*

The legislature may argue that it must maintain the current minority voting age population percentage (58%) of the Second Congressional District to avoid violating the nonretrogression principle.[89] If compliance with the Voting Rights Act is a compelling state interest, avoiding the retrogression prohibited by section 5 of the Act would certainly qualify as one such interest. However, in order to determine whether a new plan is narrowly tailored, one must determine the appropriate benchmark for comparison. It is unclear, though, whether the benchmark for measuring the retrogression of minority voting strength in Mississippi would be the 52.83% minority voting age population of the Second District as created by the federal court in 1984, or the 58% black voting age population of the current district, as increased by the legislature in 1991. There is evidence that the legislature increased the voting age population of the Second District in 1991 to satisfy the perceived "maximization" requirement set forth by the Department of Justice.[90] The Supreme Court has held that this supposed Justice Department policy is not required by the Voting Rights Act.[91] If the 1991 Mississippi district lines were drawn to comply with a Justice Department interpretation of the Voting Rights Act which has been rejected by the Court, the new district lines would not be narrowly tailored to meet the compelling interest of complying with the Act. This is due to the 1991 district lines not being necessary to meet the requirements of the Act. As a result, the courts may find that the 1991 lines violated the Equal Protection Clause of the Fourteenth Amendment because they were drawn considering race as a predominant factor without being narrowly tailored to meet a compelling state interest.[92] If the existing Congressional district lines drawn in 1991 violate the Equal Protection Clause, the courts would not use them as the appropriate point of comparison, but would look to the most recent Constitutionally-valid district lines as the benchmark for the nonretrogression principle as the Supreme Court did in *Abrams v. Johnson*.[93] In *Abrams*, opponents of a federal district court-ordered plan appealed on the grounds that the devised plan contained only one majority-minority voting district, rather than three majority-minority districts under the existing plan adopted by the state legislature in 1992, thereby constituting retrogression.[94] The appellants argued that this retrogression violated section 5 of the Act.[95]

---

[89] *See* Beer v. United States, 425 U.S. 130, 141 (1976) (generalizing that purpose of section 5 has always been to make sure that no changes in voting procedure would result in retrogression regarding position of minorities with respect to their participation in electoral process).

[90] *See, e.g.*, Paul Barton, *Espy Success Fails To Turn Blacks From Remap Goal*, COMMERCIAL APPEAL, Dec. 25, 1991, at A1 (stating that according to members of Mississippi Legislature, 60% black majority is generally needed for satisfactory minority representation); Reed Branson, *Gerrymandering May Be Needed to Boost Black Vote, U.S. Official says*, COMMERCIAL APPEAL, July 22, 1991, at B1 (citing Justice Department official's statement that Southern legislators must create majority-minority districts wherever possible to increase black representation).

[91] *See supra* notes 87-88 and accompanying text.

The Supreme Court rejected this argument because the existing 1992 plan had been found to unconstitutionally subordinate traditional districting principles to racial considerations.[96] Indeed, the Court noted that the state adopted the 1992 plan at the behest of the Justice Department which was following the constitutionally defective maximization policy, thereby leading to the augmentation of minority voting strength in Georgia's Second Congressional District in 1992.[97] In *Abrams*, the Court held that an earlier plan, developed in

---

[92] *See* Bush v. Vera, 517 U.S. 952, 983 (1996) (rejecting state's argument that decrease in African-American voting age population in district from 40.8% in 1980 census to 35.1% in 1990 census required state to draw district lines which increased African-American voting age population to 50.9% to avoid retrogression).

[93] 117 S. Ct. 1925, 1938 (1997). The Court determined that an invalid prior redistricting plan cannot serve as a benchmark to determine whether a proposed plan would lead to retrogression pursuant to section 5. *Abrams*, 117 S. Ct. at 1938.

[94] *Abrams*, 117 S. Ct. at 1930.

[95] *Id.* 1938.

[96] *Id.* at 1938-39. The Supreme Court found that the appellants failed to show that black voters in any district suffered retrogression in their voting strength under the court-ordered plan as compared to the 1982 plan. *Id.* at 1939.

[97] *Id.*

1982, was the appropriate benchmark.[98]

3. *The Constitutionality of the 1984 Benchmark*

Using the equal protection analysis set forth in both *Shaw* and *Abrams*, the 1984 federal court-ordered Mississippi plan would be the legislature's benchmark because it would be considered the most recent, constitutionally acceptable plan.[99] Although implemented before the Supreme Court clarified that race-conscious districting, done in effect to comply with the Voting Rights Act, could violate the Equal Protection Clause, the 1984 court-ordered plan meets the exacting standards of *Shaw* and its progeny.

In 1982, the United States Attorney General objected to a Congressional redistricting plan adopted by the Mississippi Legislature following the 1980 census.[100] Minority voters then filed suit to enjoin enforcement of the plan prior to its being precleared, and urged the Court to order elections under an alternative court-ordered plan.[101] The three-judge court ordered the 1982 Congressional elections to be held under an interim districting plan which contained a majority black total population district (53.77%) with a black voting age population of 48.05%.[102] The United States Supreme Court vacated and remanded the case for further consideration in light of Congress' 1982 amendments to section 2 of the Voting Rights Act.[103]

In fashioning new district lines for the 1984 congressional elections, the three-judge district court concluded that its earlier plan violated the vote dilution standard of the amended section 2.[104] The court recognized that in creating a new 52.83% black voting age population district for the 1984 elections, it was utilizing a "race-conscious remedy."[105] In addition, it recognized the tension created between such a remedy and the "results" test of the amended section 2.[106] However, the court noted that it was utilizing race solely to remedy specific past and present racial discrimination in order to meet the requirements of section 2.[107] It also took pains to point out that its new district lines did not ensure proportional representation for blacks, a right expressly disclaimed in the language of the amended section 2.[108]

---

[98] *Id.*

[99] Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss. 1984) (involving similar difficulties regarding redistricting plans).

[100] *Jordan*, 604 F. Supp. at 809. The Attorney General determined that dividing the concentration of black majority counties into three districts, rather than maintaining a single district, equaled an unlawful dilution of minority strength. *Id.*

[101] *Id.*

[102] *Id.* at 810. During elections held under this court-ordered plan in the Fall of 1982, a black Democrat was defeated by a white Republican. *Id.* at 812. This defeat was believed by the court to be caused partly by racial bloc voting. *Id.*

[103] *Id.* at 808.

Perhaps most importantly, the court rejected plans that would have furthered a "maximization" policy, later rejected by the Supreme Court.[109] The district court concluded that "after considering the totality of the circumstances, the creation of a Second District with a clear black voting age population majority of 52.83% is sufficient to overcome the effects of past discrimination and racial bloc voting," thereby promoting fairness in the electoral process.[110]

Thus, the court took great care to use race only to that extent minimally necessary to meet the requirement set forth by the vote dilution standard of section 2 of the Act. This is precisely the kind of narrow tailoring to meet a compelling interest now required by the Supreme Court in order to avoid a violation of the Equal Protection Clause. The districts created by the Court in 1984 would thus comply with *Shaw* and its progeny and would be the appropriate benchmark for determining retrogression under *Beer* and *Abrams*.

---

[104] *Id.* at 810-14. The court considered the Senate factors of the totality of the circumstances test as articulated in *White v. Regester,* 412 U.S. 755 (1973) (developing factors courts should consider in deciding section 2 violations) and *Zimmer v. McKeithen,* 485 F. 2d 1297 (5th Cir. 1973) (applying these factors in 5th Circuit), and concluded that Mississippi had a long history of de facto and de jure discrimination as well as racial bloc voting which operated to dilute black voting strength. *Jordan,* 604 F. Supp. at 810-14.

[105] *Jordan,* 604 F. Supp. at 814. However, the court found the creation of such a district to be sufficient in overcoming the effects of past discrimination and racial bloc voting. *Id.*

[106] *Id.* (citing United Jewish Orgs. v. Carey, 430 U.S. 144 (1977)).

[107] *Id.*

[108] *Id.*

[109] *Id.* Black plaintiffs argued that a black voting age population of 60% would be required to ensure the election of a representative of their choice. *Id.* The court rejected this maximization argument as inconsistent with the language of section 2 as well as the legislative history of the Act. *Id.*

[110] *Id.*

IV. CONCLUSION

If compliance with the Voting Rights Act is a compelling state interest, and if Mississippi must maintain one majority-minority district in order to comply with the non-retrogression standard of section 5, the state legislature's decision to use race as a factor in drawing Congressional districts after the 2000 census will not violate the Equal Protection Clause of the Fourteenth Amendment as long as the districts are narrowly tailored to meet the compelling state interest of complying with the Act. The State may use compliance with the non-retrogression mandate of section 5 of the Voting Rights Act as a compelling state interest. If the Mississippi Legislature increased the black voting age population of the Second District in 1991 to comply with a "maximization" policy, the courts may find that that plan is not the appropriate benchmark with which to determine retrogression. To be narrowly tailored to meet the compelling interest of nonretrogression, the African-American voting age population contained in the district, as created by the court-order in 1984, would be the appropriate benchmark, and the population of a majority-minority district after 2000 may be limited to 52.8% minority voting age population.

RETHINKING FREE EXERCISE OF RELIGION AFTER *SMITH* AND *BOERNE*: CHARTING A MIDDLE COURSE

Arnold H. Loewy[*]

This article is about the Free Exercise of Religion Clause:[1] its past, its present, and mostly its normative future.[2] The United States Supreme Court's initial foray into the Free Exercise Clause was *Reynolds v. United States*,[3] wherein it took the position that the clause could never be invoked as a defense to a religiously-motivated violation of a generally-valid criminal law.[4] Thus, it upheld the conviction of a Mormon for violating a law forbidding the practice of polygamy.[5] The Court concluded that allowing Reynolds a free exercise defense would "permit every citizen to become a law unto himself" and practice human sacrifices if they were an essential element of his religious worship.[6]

While not always so hidebound,[7] the Court never formally abandoned *Reynolds* until 1963 when, in *Sherbert v. Verner*, the Court sought to recast *Reynolds* and its progeny as predicated upon a "compelling state interest."[8] For the next twenty-seven years, the Court maintained the form, if not the substance, of that standard.[9] Then, in 1990, the Court in *Employment Division v. Smith*, per Justice Scalia, returned to the *Reynolds* view that the free exercise clause was never available as a defense to the violation of a criminal statute not targeted at religion.[10]

---

[*] Graham Kenan Professor of Law, University of North Carolina School of Law. In writing this article, I profited from the advice of my colleague Eugene Gressman. I am grateful for the research assistance of former UNC Law students David Teeples and Michael Hallam, and current UNC Law student Raymond Thomas Rufer.

[1] "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend I.

[2] Its past and present are described in the paragraphs that follow. For those already familiar therewith, please turn to Part I where discussion of the normative future of the clause begins.

[3] 98 U.S. 145 (1878).

[4] *Reynolds*, 98 U.S. at 166-67.

[5] *Id.* at 168.

[6] *Id.* at 166-67.

[7] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (stating that "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.").

To put it mildly, Congress was not pleased with *Smith*. It expressed its displeasure by enacting the Religious Freedom Restoration Act, affectionately known as RFRA. RFRA's precise terminology provides:

> The purposes of this chapter are-
>
> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[11]

In *City of Boerne v. Flores*,[12] the Court reacted to RFRA with the same type of contempt that Congress had for *Smith*. Seeing itself, and not Congress, as the arbiter of Constitutional rights, the Court held RFRA unconstitutional, at least insofar as nonfederal cases were concerned.[13] Three Justices dissented on the ground that *Smith* was ripe for reconsideration.[14] Justice

---

[8] *Sherbert*, 374 U.S. 398, 403 (1963).

[9] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 236 (1972) (stating that State must show how granting exception to Amish would hamper its strong interest in compulsory education).

[10] Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

[11] 42 U.S.C. § 2000bb(b) (Supp. V 1993).

[12] 117 S. Ct. 2157 (1997).

[13] *Boerne*, 117 S. Ct. at 2172. The federal cases may present a different question. *See, e.g.*, Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858 (8th Cir. 1998) (stating that Court in *Boerne* did not determine constitutionality of RFRA as it applied to federal law).

[14] *See Boerne*, 117 S. Ct. at 2176 (O'Connor, J., dissenting) (stating that

Scalia added a concurrence, emphasizing the correctness of *Smith.*[15]

In this article, I focus on the nature of the free exercise clause, the rationale for the divergent positions, and chart a course that I believe is better than either the *Reynolds-Smith-Boerne* approach or the *Sherbert*-RFRA approach.

I. WHY FREE EXERCISE CASES ARE SO PROBLEMATIC

There are two features of the Free Exercise Clause that differentiate it from other constitutional provisions. One is the unique prevalence with which free exercise claims can be raised. The other is the three-sided balance raised in most free exercise cases among the believer who seeks the benefit, the nonbeliever who could claim unequal treatment if the believer's claim is granted, and the State which, for its own reasons, wishes to deny the claim.

Let us first focus on the ubiquitous potential of a free exercise claim. Although other areas of constitutional law are expansive,[16] none are as limitless as a potential free exercise claim. There is simply no government activity that could not compromise someone's conscience. For example, if twenty years ago, someone asked for an illustration of a government activity that did *not* implicate free exercise concerns, one might have suggested assigning social security numbers to potential welfare recipients. Of course, she would have been wrong because we now know that social security numbers can (according to at least one religion) destroy the soul of those to whom they are assigned.[17]

Smith was decided wrongly); *see id.* at 2186 (Breyer, J., dissenting) (questioning *Smith*'s soundness); *see id.* at 2186 (Souter, J., dissenting) (stating that *Smith* should be reargued).

[15] *See id.* at 2172 (Scalia, J., concurring in part) (arguing that *Smith* decision was not undermined by historical evidence in O'Connor's dissent). Justice Scalia was joined by Justice Stevens. *Id.* at 2172.

[16] *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 376 (1968) (freedom of speech). But regardless of how expansive the opportunity to assert the right to freedom of speech might be, it must have something to do with communication.

[17] *See* Bowen v. Roy, 476 U.S. 693, 696 (1986).

The three-sided balance is even more problematic. What is striking about the considerable literature on the subject is the almost uniform failure to appreciate the three-sided balance.[18] One group of authors, extolling the importance of freedom of conscience, views the problem primarily from the perspective of the believer, whose conscience is threatened or compromised by the statute.[19] To these authors, the only interest to balance against the free exercise interest is the interest of the government, which they tend to define rather narrowly.[20] Not surprisingly, these authors would protect the free exercise of religion except when the government can assert a compelling interest (in the most stringent sense of that standard) that can be accomplished in no other manner.[21] Another group of authors, concerned about government favoritism towards religion, would never find an exemption to be constitutionally compelled.[22] In their view, such an exemption would always disfavor non-believers to a sufficiently high degree that even a religious exemption voluntarily bestowed on a religious group by a legislature should be unconstitutional, or at least constitutionally suspect.[23]

Of course, the first group of authors lauds *Sherbert* and

---

[18] Arguably, Professors Choper and Greene are exceptions. *See* Jesse H. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943, 961 (1986); Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1643 (1993).

[19] Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 MONT. L. REV. 145 (1995); Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990).

[20] *See, e.g.*, Laycock, *supra* note 19, at 148-49 (stating that government's interest is weighed only by "the number of reasonably anticipated claims" for exemptions).

[21] *See, e.g.*, Paulsen, *supra* note 19, at 254 (stating that government's burden on religious freedom must be "least restrictive means" of achieving compelling governmental interest).

[22] Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259; Mark Tushnet, *The Rhetoric of Free Exercise Discourse*, 1993 BYU L. REV. 117; William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[23] *See e.g.*, Lupu, *supra* note 22, at 265 (stating that religious gerrymander is presumed unconstitutional).

RFRA while condemning *Smith.* Just as obviously, the second group of authors praises *Smith* while condemning *Sherbert* and RFRA. Two of the latter, Professors Eisgruber and Sager, unwittingly illustrate the difficulty of achieving anything resembling a proper balance. They suggest four possible constructions of the Free Exercise Clause, the two most moderate of which are: (1) "The exercise of religion is free so long as it is free from burdens greater than those government places upon other, comparable activities; hence, a law prohibits the free exercise of religion if and only if it treats religion badly by comparison to other activities" (the *Smith* position); and (2) "The exercise of religion is free only if it is free from all burdens except those justified by a state interest of the highest order; hence a law prohibits the free exercise of religion if and only if religious practices are exempt from most laws of general application" (the *Sherbert*/RFRA position).[24]

In the pages that follow, I intend to establish that this "almost everything or almost nothing" approach to the Free Exercise Clause is neither necessary nor desirable. Instead, an open-ended multi-factored test is the most appropriate manner for the Court to resolve free exercise cases.

II. IS THE QUESTION OPEN?

One could certainly argue that *Smith* and *Boerne* have settled the issue, and that nothing more need be said about it. At this juncture, however, such a conclusion appears premature. Certainly, in *Boerne*, three Justices, O'Connor, Souter, and Breyer, specifically indicated a willingness to reconsider

---

[24] Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After* City of Boerne v. Flores, 1997 SUP. CT. REV. 79, 110-11. The other alternatives are: (1) "The exercise of religion is free so long as it is free from deliberate political persecution; hence, a law prohibits the free exercise of religion if and only if it specifically singles out religious practice for unfavorable treatment" and (2) "The exercise of religion is free only if it is free from any cost at all; hence, a law prohibits the free exercise of religion if it imposes any costs upon religious practice (and, perhaps, if it impedes religion from defraying its costs)." *Id.*

Smith.[25] Four years earlier, Justice Souter explicitly suggested such a reexamination: "[I]n a case presenting the issue, the Court should reexamine the rule *Smith* declared."[26]

Of course, two Justices, Stevens and Scalia, explicitly voted to reaffirm *Smith*.[27] The remaining four Justices, Rehnquist, Kennedy, Thomas, and Ginsburg, did not explicitly vote on the question. Consequently, one could argue that they were neutral on the continuing vitality of *Smith*. However, since Rehnquist and Kennedy were part of the original *Smith* majority and have done nothing since to question that decision, I believe they can be added to Stevens and Scalia as firm votes in favor of retaining *Smith*.

That leaves Thomas and Ginsburg, neither of whom has spoken on the question. In a pre-*Boerne* RFRA case, Justice Thomas seemed inclined to read the statute broadly.[28] Whether such a broad reading would extend to the Free Exercise Clause is, of course, an open question. I would place no weight on either Justice's silence on this issue in *Boerne* for the simple reason that the question was not before the Court. Consequently, I believe that the question to which this article is addressed is an open one.

III. WHAT FACTORS SHOULD MATTER

The number of relevant factors to be considered under a Constitution dedicated to protecting both equality and free exercise of religion is such that any fair effort to achieve a balanced result requires a court to act virtually as a court of equity. Indeed, the potential factors are so numerous that I am not sure I have identified them all; other factors may suggest themselves in future litigation. I have, however, identified the following factors as at least potentially relevant: (1) the importance of the government's interest, (2) whether there are less intrusive means of meeting the government's interest, (3) the importance of the religious interest, (4) whether there are alternative means of meeting the religious interest, (5) the directness of the prohibition, (6) whether significant numbers of nonbelievers would consider themselves benefited if they could obtain the religious exemption, and (7) whether the issue involves government performance of its own function or the regulation of the actions of others.

---

[25] *See supra* note 14 and accompanying text.

[26] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring).

[27] *See supra* note 15 and accompanying text.

[28] *See* Swanner v. Anchorage Equal Rights Comm'n, 513 U.S. 979, 980 (1994) (Thomas, J., dissenting) (stating that he "would grant certiorari to resolve whether, under RFRA, an interest in preventing discrimination based on marital status is sufficiently 'compelling' that respondent may substantially burden petitioner's exercise of religion."). *See* discussion of *Swanner*, *infra* Part VII A.

While one could hardly challenge the importance of the government interest as a relevant factor, the less intrusive means factor is more problematic. In one sense, there is always a less intrusive means for government: exempt religion. The problem, of course, is that such an exemption may substantially undercut the government interest, unfairly disadvantage nonadherents, or both. Nevertheless, there are cases where the exemption neither substantially undercuts the government interest nor unduly burdens nonbelievers. For example, in *Wisconsin v. Yoder*,[29] the Court found (probably correctly) that the State's interest in compulsory education was not materially compromised because of the willingness of Amish children to attend school through the eighth grade and their continued "learning by doing" mode of education.[30] Furthermore, because most non-Amish want their children to go to school, it is hard to find an unfair disadvantage to nonadherents.[31]

Assessing the impact of an exemption on a governmental interest depends to a significant degree on the breadth of the exemption. Obviously, an exemption for only the parties before the court will be relatively trivial, while an exemption for everybody in the governed population will be more disruptive. Consider *Employment Division v. Smith*,[32] where members of the Native American Church, Alfred Smith and Galen Black, effectively sought a religious exemption from laws precluding the use of peyote.[33] In assessing the impact of granting the exemption, should the question be the impact of granting the exemption to (A) Smith and Black, (B) all Native American Church members who smoke peyote under the same conditions as Smith and Black, (C) all people who would like to smoke peyote for religious reasons, (D) all people who would like to use any drug for religious reasons, (E) all people who would like to use peyote for any reason, or (F) all people who would like to use any drug for any reason? Professor Marshall would analyze the impact of an exemption in accord with (E) or (F).[34] Professor Laycock, on the other hand, would answer (B) or (C).[35] In my judgment, Professor Laycock is closer to the mark on this issue. Because peyote is ingested under strictly controlled conditions by the religion at bar, the harm created by general use simply is not present.[36]

---

[29] 406 U.S. 205 (1972).

[30] *Yoder*, 406 U.S. at 222-23.

[31] For a discussion of this issue, *see infra* Part VI C.

[32] 494 U.S. 872 (1990).

In regard to the third factor, importance of the religious interest, I am certainly aware of the case against focusing on centrality of belief. To the extent that the law will exempt one whose core belief requires certain contrary behavior, but will not provide a similar exemption to one whose behavior is impelled by a more peripheral belief, individuals and religions will be encouraged to transform peripheral beliefs into core ones.[37] Nevertheless, there does seem to be a difference between imprisoning a person for practicing polygamy when he believes that his failure to do so will condemn him to eternal damnation as opposed to imprisoning him when he believes that his religion gives him the privilege, as opposed to the duty, to practice polygomy.[38] Because of the danger of courts delving too deeply into religious beliefs, I would be loath to make this the overriding factor. Nevertheless, it need not and should not be altogether irrelevant.

---

[33] *Smith,* 494 U.S. at 876. The State of Oregon prohibited the use of certain controlled substances, including peyote ingested at a religious ceremony. *Id.* at 874, 876. After using peyote in a Native American religious ceremony, Smith and Black were fired from their jobs, and were denied state unemployment benefits because of their criminal drug use. *Id.* at 874.

[34] *See* Marshall, *supra* note 22, at 322.

[35] *See* Laycock, *supra* note 19, at 145.

[36] Its use is only permitted at a gathering held on grounds far removed from population centers. Only certain adult males are permitted to use peyote. Their families are present to deal with any potential adverse effects. Only at the end of the weekend, when any effects have worn off, does the group leave. Using peyote or any other hallucinogen outside of this controlled context is strictly forbidden by the religion.

[37] *See Smith,* 494 U.S. at 886-87 (warning that courts "must not presume to

The fourth factor, alternate means for preserving the religious interest without totally negating the government interest, is not often analyzed.[39] A form of it, however, has been statutorily required for those seeking a religious exemption from military service.[40] Because we are seeking to balance equities, including fairness to nonbelievers, this requirement should be an important part of the equation. For example, one whose religious belief forbids being photographed may be required to commission an artist to sketch a likeness of herself as a condition of obtaining a driver's license.[41] Or, one whose religion requires the carrying of a knife may, when in school, be required to carry only a fake knife.[42]

The fifth factor, directness of the interference, ought to be

---

determine the place of a particular belief in a religion or the plausibility of a religious claim").

[38] *Cf.* United States v. Reynolds, 98 U.S. 145, 168 (1879) (holding that states may prohibit polygamy even though Mormon doctrine requires it).

[39] *But see* Jesse H. Choper, *The Rise and Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651, 668, 680 (1991).

[40] 50 U.S.C. App. § 456(j) (1994). The statute allows conscientious objectors to be assigned to non-combatant duty or "civilian work contributing to the maintenance of the national health, safety, or interest." § 456(j).

[41] *See* Quaring v. Peterson, 728 F.2d 1121, 1126 (8th Cir. 1984), *aff'd by an equally divided court, sub nom.*, Jensen v. Quaring, 472 U.S. 478 (1985) (per curiam) (holding that state's requirement of photograph on driver's license unconstitutionally burdened Quaring's free exercise of religion). Since Quaring's interpretation of "graven images" included sketches as well as photographs, the requirement of a painting would not have worked. Whether her free exercise claim should have prevailed is a different question. *Quaring*, 728 F.2d at 1123.

[42] *See* Cheema v. Thompson, 67 F.3d 883 (9th Cir. 1995). Whether such a compromise will suffice may depend upon the nature of the religion. If it does not fully meet religious needs, it may partially meet them. *See infra* Part VII B.

much more significant than it appears to be in much of the case law. Surely, there is a difference between convicting and incarcerating religiously motivated peyote users (a direct interference) and denying unemployment benefits to those persons (a less direct interference). The Court in *Smith* held that the constitutionality of the former necessarily implied the constitutionality of the latter.[43] On the other hand, when the only issue before the Court was the denial of unemployment compensation, it was totally inappropriate for the Court to decide that a nonexistent, theoretical, potential criminal prosecution of Alfred Smith and Galen Black would have faced no First Amendment impediment. Deciding that question was the juridical equivalent of slaying a gnat with a sledgehammer.

To be sure, the Court has not always conveyed the impression that directness matters. Indeed, most of the successful free exercise claims have involved unemployment compensation[44] or other indirect limitations on religion.[45] Nevertheless, it seems clear that directness should matter. Judges and scholars reach different conclusions over such questions as the right of Saturday Sabbatarians to open their stores on Sunday[46] or receive unemployment compensation when unemployed because of their unavailability for work on Saturday.[47] There can be no doubt, however, that a law that *required* Saturday labor, or *forbade* Saturday worship, under pain of criminal penalty would be viewed with significantly more disdain.[48]

---

[43] Employment Div. v. Smith, 494 U.S. 872, 875 (1990).

[44] *See* Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 834 (1989) (holding that state's refusal to award unemployment compensation to someone who declined employment which would have required him to work on Sunday was unconstitutional); Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 146 (1987) (holding that state's refusal to award unemployment compensation to worker fired after refusing to work on her Sabbath was unconstitutional); Sherbert v. Verner, 374 U.S. 398 (1963) (same). *See infra* Part VI B.

[45] *See* Follett v. Town of McCormick, 321 U.S. 573, 578 (1944) (declaring unconstitutional occupational license tax on book agents as applied to minister who distributed tracts); Murdock v. Pennsylvania, 319 U.S. 105, 116-17 (1943) (same).

[46] *See* Braunfeld v. Brown, 366 U.S. 599, 607 (1961) (upholding statute that prohibited retail sales on Sundays despite disparate economic impact on orthodox Jewish merchants). *See infra* Part VI B.

[47] *See supra* note 44.

The sixth factor, whether a significant number of nonbelievers would personally desire the benefit sought by believers, is significant for two reasons. The first and more obvious one is that when the religious benefit is one that few others would want, no great harm is done to the nonbeliever by granting the exemption. The second and somewhat less obvious reason is that the general undesirability of the benefit sought is some evidence of, though certainly not a perfect proxy for, sincerity. The Supreme Court's two significant Amish cases, *United States v. Lee*[49] and *Wisconsin v. Yoder*,[50] well illustrate this dichotomy.

In *Yoder*, the Court upheld the right of Amish parents to opt out of public or other formal education beyond age fourteen.[51] Because public schools are generally considered a benefit, an overwhelming majority of non-Amish would not feel disadvantaged by this exemption. In *Lee*, on the other hand, an Amish employer sought exemption from social security taxes, claiming that neither he nor his Amish employees believed in participating in such programs.[52] One would assume that there is a significantly higher percentage of non-Amish employers who would want to opt out of social security taxes than non-Amish parents who would want to opt out of compulsory education. Consequently, a finding for Lee would appear to disadvantage non-Amish in a way that a finding for Yoder would not. Though not clearly relying on this reasoning, the Court did reach results suggested by this factor.[53]

The importance of the effect of Amish-based exemptions upon non-Amish persons should not be understated. The core concern of the *Smith* Court and its academic adherents appears to be that an exemption for one religious group may subtly coerce nonadherents to want to become adherents. Whether such coercion is a problem depends upon the extent to which nonadherents would, for nonreligious reasons, want to do what the exemption allows adherents to do for religious reasons. Because few non-Amish would wish to avoid public school for their children while many non-Amish would wish to avoid paying their employees' social security tax, the dichotomy suggested by the cases makes sense.[54]

---

[48] Possibly in rare instances, such as jury duty or military service, sovereign compulsion to work on one's Sabbath might be sustained.

[49] 455 U.S. 252 (1982).

[50] 406 U.S. 205 (1972).

[51] *Yoder*, 406 U.S. at 234.

[52] *Lee*, 455 U.S. at 254-55.

[53] *See infra* Part VI C.

The final factor that I have currently identified is whether the government is performing its own function or regulating the actions of others. The dichotomy was explored in *Bowen v. Roy*[55] where the Court clearly held that the federal government was justified in assigning a social security number to Roy's daughter notwithstanding Roy's belief that such an assignment was detrimental to her soul.[56] However, a different majority of the Court suggested, although it stopped short of holding, that Roy could not be required to use the number in his dealings with the government.[57] *Roy* was followed by *Lyng v. Northwest Indian Cemetery Protective Ass'n*[58] which held that the federal government could build a road on its own land, notwithstanding the destructive impact that such a course of conduct would have on the religious interest of the plaintiffs whose right to worship the undeveloped land would be virtually destroyed.[59]

In both the Court's view, according to the previous two cases, and my personal view, when this last factor is in the government's favor, the government should virtually always win. The principle reason for this is the vast amount of potential religious claims that, if taken seriously, could hamstring government. To illustrate, in *Roy*, the Court noted that if an individual's belief could affect government activity, a particular religion could object to storing records in green file cabinets, and either preclude the government from so acting, or at least be able to litigate whether the government could so act.[60]

---

[54] *See infra* Part VI C.

[55] 476 U.S. 693 (1986).

[56] *See Roy*, 476 U.S. at 699 (explaining that Free Exercise Clause does not require government to act in ways consistent with religious beliefs of particular citizens).

[57] *See infra* Part VI D.

[58] 485 U.S. 439 (1988).

[59] *Lyng*, 485 U.S. at 447.

IV. UNACCEPTABLE ALTERNATIVES TO *AD HOC* BALANCING

Before asking the reader to accept my proposed *ad hoc* balancing, it is incumbent upon me to demonstrate the inadequacies of the alternative approaches. In this section, I will analyze the *Smith* approach, the *Sherbert*/RFRA approach, and a third approach suggested by Professor Michael McConnell. Ultimately, I conclude that none of them satisfactorily captures all of the necessary nuances of the Free Exercise Clause.

A. The Smith *Approach*

The *Smith* opinion has an appearance of equity in its theme that one is to neither gain nor lose because of her religious belief.[61] If one man ingests peyote because of a religious command while another ingests it because he likes the euphoria, each are to be equally condemned. On the other hand, if *only* religious use of peyote is forbidden, the law would be unconstitutional.[62] Thus, the Free Exercise Clause, in form at least, neither favors nor disfavors religion; it is a veritable equal protection clause, if you will.

Some people may think that a completely neutral Free Exercise Clause would be fair and proper, but the clause is designed to protect free exercise of religion, not equalize it. Although I do not disagree with those who contend that the clause is not self-defining and that the *Smith* definition is linguistically plausible,[63] I do contend that it is a rather crabbed definition.

---

[60] *Roy*, 476 U.S. at 700.

[61] Employment Div. v. Smith, 494 U.S. 872, 879, 885 (1990).

[62] *See, e.g.,* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (stating that law that discriminates based on religion gets no protection by Free Exercise Clause).

[63] *See* Eisgruber & Sager, *supra* note 24, at 83, 110-11 (stating *Smith* was "fundamentally correct" and noting several different interpretations of Free Exer-

Other provisions setting out special rights sometimes treat people exercising that right more favorably than others not exercising the same right, but otherwise doing the same thing.[64] For example, a person distributing leaflets protected by the First Amendment cannot be convicted for creating a risk of littering.[65] On the other hand, if her leaflets are not protected by the First Amendment, and her conduct is otherwise identical, she can be punished.[66] Similarly, rights of personal autonomy are sometimes protected only if the parties are married,[67] and, on at least one occasion, Justice Scalia led the Court in reaching that result.[68]

More importantly, free exercise of religion is singled out as special. The Equal Protection Clause would have worked smoothly if the only principle free exercise embodied was nondiscrimination.[69] But can we really say that a clause designed

---

cise Clause).

[64] *But see* Barnes v. Glen Theater, Inc., 501 U.S. 560, 579 (1991) (Scalia, J., concurring) (contending that protected rights are protected only against discriminatory treatment). In *Barnes*, Justice Scalia argued that a statutory prohibition against public nudity could be applied equally to speech and nonspeech. *Barnes*, 501 U.S. at 577-79 (Scalia, J., concurring). Thus, if nude hot dog vendors were forbidden, a similar prohibition could be applied to nude dancers. This perspective was indigenous to Scalia among the Court's Justices.

[65] Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 162 (1939).

[66] *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) (stating government can restrain and punish speech such as commercial advertising according to Constitution). Although because of changes in the law of commercial speech, the respondent in *Valentine* would today probably have a First Amendment defense, the principle that access to public fora for individuals seeking to exercise First Amendment rights is greater than generic citizen access remains accurate.

[67] *See* Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (noting constitutional right to use contraceptives cannot be denied to married persons because of basic idea of privacy in marriage relationships). *But cf.* Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (stating rational grounds must exist before government can treat distribution of contraceptives differently for married and unmarried persons).

[68] *See* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989) (stating that natural father of child cannot assert parental rights over child born from woman in marriage with another man).

[69] *See* Washington v. Davis, 426 U.S. 229, 239 (1976) (holding that neutral statute that intentionally discriminates on basis of race is forbidden by Equal

to protect free exercise of religion is appropriately honored when it would allow for the conviction of a priest who drank a ceremonial drop of wine in a church in a "dry" county simply because the law in its majestic equality also convicted people who ran illegal bars?

If the answer to the hypothetical is "no," then *Smith* is necessarily wrong, unless the result that it yields is so frequently correct that we are prepared to accept some error in order to have a workable rule. For the reasons that will be developed further in this article, *Smith* is not so frequently correct that we can simply accept its occasional bad results as a necessary cost of a workable rule. Rather, *Smith*'s willful blindness to all of the equities is a vice, not a virtue.

B. The Sherbert/*RFRA Approach*

To defenders of *Smith*, the preceding section probably sounded uncomfortably like another defense of the compelling state interest test. It is not. The compelling state interest test works well when the only interests at stake are those of the government on the one hand and the constitutional claimant on the other. But, when the nonbelievers' interest is also at stake, compelling interest is notoriously inappropriate (at least if the term is defined in a manner approximating its dictionary definition).

In *Lee*,[70] the Court said that the government had a compelling interest in collecting social security taxes from an Amish carpenter, but that conclusion is surely questionable. Justice Stevens, quite correctly, pointed out that the government's fisc would probably be improved, not worsened, by excluding the Amish.[71] Yet, out of a concern for the unfairness to the non-Amish taxpayers, Stevens concurred in the result.[72]

Similarly, the government's interest in building the road in

Protection Clause).

[70] United States v. Lee, 455 U.S. 252, 258 (1982).

[71] *Lee*, 455 U.S. at 262 (Stevens, J., concurring).

[72] *Id.* at 263 (Stevens, J., concurring).

Lyng was hardly compelling. The Court concluded, again correctly, that its interest need not be compelling when it was building a road on its own land.[73] Because of the potential ubiquity of religious beliefs, the Court stated that the compelling interest test need not be met.[74] Thus, the Court either inadvertently (*Lee*) or advertently (*Lyng*) has abandoned compelling interest when necessary to reach a fair result. Because the compelling interest test was abandoned when appropriate, inaccurate regarding the proper question to be asked, and has now been permanently scuttled by *Smith*, I would not recommend returning to it.

C. The McConnell Approach

Recently, Professor McConnell suggested a test that calls for viewing free exercise claims from the perspective of a majoritarian religion.[75] According to Professor McConnell, if government action disadvantaging a minority religion would not have been adopted had the religion been a majority religion then the Free Exercise Clause should invalidate it.[76] Because McConnell's test is couched in terms rendering minority religions equal to majorities, there is a seductive quality to it. It almost sounds like equal protection for religion.

Despite its seductiveness, it is unworkable for at least two reasons. First, we do not always know what a legislature would do if the offended religion were in the majority. For example, McConnell's paradigm is a law requiring Saturday Sabbatarians to testify on the Sabbath, when it would never similarly offend Sunday Sabbatarians.[77] Yet, a recent successful free exercise case in the Supreme Court involved a Sunday Sabbatarian who refused to work on his Sabbath, and who sought and received the same right to unemployment compensation that was in place for a Saturday Sabbatarian.[78]

---

[73] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 457-58 (1988).

[74] *Lyng*, 485 U.S. at 457-58.

[75] McConnell, *supra* note 19, at 1148.

[76] *Id.*

[77] *See id.* at 1134.

The second and more significant reason for rejecting McConnell's proposal is that the ubiquity of potential religious beliefs could cause government to grind to a halt. For example, if the Native American religion constituted a majority religion, I assume that government would never use social security numbers (at least when dealing with adherents of that religion) or develop sacred land. Furthermore, I would suppose that if some tiny religion were opposed to green file cabinets (or more realistically, computers), the McConnell theory would preclude government use of these items, at least when dealing with those religious groups. Because government would be unduly hampered under such a regime, I do not believe that McConnell's test is viable.

V. The Costs and Benefits of *Ad Hoc* Balancing in This Context

Obviously *ad hoc* balancing lacks the certainty of specific rules. It doesn't even measure up to neat pre-balanced multipart tests. It does, however, have the advantage of flexibility, which, as I hope is clear by now, is imperative to a just resolution of free exercise claims. As Kathleen Sullivan has so convincingly demonstrated, neither approach is always better.[79] For the reasons that we have explored, when religious exemptions from otherwise constitutional statutes are in issue, nothing more stringent than a quite amorphous *ad hoc* balancing standard can reach the better result with sufficient frequency to be justified.

I do not for a moment denigrate the general value of rules over standards. Predictability, fair notice to those who govern and those who are governed, and the feeling that constitutionality ought not depend on comparing incomparables (such as is a yard longer than a rock is heavy)[80] all militate in favor of rules, or at least carefully cabined standards. However, even the modern-day champion of rule-ordered jurisprudence, Justice Antonin Scalia, would limit it to those categories of cases for which it is appropriate.[81]

---

[78] Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834-35 (1989); *see also infra* Part VI B (discussing Saturday Sabbatarian cases).

[79] *See* Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992) (arguing that categorization and balancing are competing responses to constitutional issues, but neither response is better in all situations).

There are some constitutional limitations that are or ought to be absolute. For example, government ought not to be able to punish a speaker because of the offensiveness of his message.[82] Whatever harm may be done by the speaker has been constitutionally pre-determined to be outweighed by the importance of limiting a government's ability to pick and choose which speech to suppress.[83] Similarly, legislation that intentionally discriminates against a racial[84] or religious[85] minority is almost never constitutional.

---

[80] *See* Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (stating that balancing interests should be abandoned because often two interests are too different to be balanced against each other).

[81] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186-87 (1989). Justice Scalia stated: "I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them." *Id.*

[82] *See, e.g.,* Texas v. Johnson, 491 U.S. 397, 420 (1989) (holding burning American flag constituted expressive conduct protected by First Amendment); Arnold H. Loewy, *The Flag-Burning Case: Freedom of Speech When We Need It Most*, 68 N.C. L. REV. 165, 167-74 (1989) (supporting holding that burning American flag constituted First Amendment speech).

[83] *See* Arnold H. Loewy, *Freedom of Speech as a Product of Democracy*, 27 U. RICH. L. REV. 427, 439 (1993) (allowing unlimited advocacy can cause no harm that can legitimately be counted as harm); Arnold H. Loewy, *Criminal Speech: Should Free Trade in Ideas Be Absolute?*, 2 CRIM. L.F. 117, 122 (1990) (government should lack power to forbid advocacy of anything). I am aware that there are those who differ with me on the above textual statement. *See, e.g.,* Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L. J. 431, 437-439 (1990) (arguing courts should not protect racist speech); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2321-22 (1989) (arguing racist speech should be subject to criminal sanctions). Indeed, to some extent the Supreme Court has not been totally true to the principle. *See* Arnold H. Loewy, *Obscenity, Pornography and First Amendment Theory*, 2 WM. & MARY BILL RTS. J. 471, 493 (1993) (discussing obscenity's inconsistency with First Amendment theory). At least on a normative basis, however, I am totally comfortable with the textual statement.

It is beyond dispute that such an absolutist pro-constitutional right approach could not apply to claims for a religious exemption under the Free Exercise Clause. Due to the ubiquity of potential beliefs, such a rule would provide a defense to those who believe that God commands murder, mayhem, or rape.[86] As the Court said in *Cantwell v. Connecticut*, "the [First] Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be."[87] The alternative rule-oriented position is *Smith*, which I have already addressed.

The most significant downside to my proposal is lack of certainty. How will a state know when it has crossed the line? How will a believer know when litigation will be fruitful? The short answer is that this is the nature of case-by-case jurisprudence. Free exercise of religion would hardly be unique. Among others, federal power under the Commerce Clause,[88] state power under the Dormant Commerce Clause,[89] and personal autonomy issues[90] are every bit as amorphous and uncertain. I am not suggesting that uncertainty is desirable, only that it is better than certainly wrong decisions.

---

[84] *See* Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding racial classifications unconstitutional). *But cf.* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding public necessity justified restrictions on civil rights of single racial group).

[85] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (holding law restricting practices because of religious motivation unconstitutional).

[86] Of course, some such people might have an insanity defense. *Cf.* Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1409 (1986) (discussing insanity defense for one who believed God told him or her to murder).

[87] *Cantwell*, 310 U.S. 296, 303-04 (1940).

[88] *See* United States v. Lopez, 514 U.S. 549, 561-63 (1995) (holding statute regulating gun possession near schools exceeded Commerce Clause authority).

[89] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142-44 (1970) (upholding balancing test for State regulation of interstate commerce). *But see* Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (finding balancing approach to negative commerce problems inappropriate).

[90] *See* Michael H. v. Gerald D., 491 U.S. 110, 130-31 (1989) (holding biological father had no right to paternal relationship with child if child's mother was married to another man); Bowers v. Hardwick, 478 U.S. 186, 190-94 (1986) (holding

VI. RETHINKING PRIOR CASE LAW UNDER THE PROPOSED TEST

A. *Reynolds and Prince*

The Supreme Court's initial foray into the Free Exercise Clause, *Reynolds v. United States*,[91] was a classic illustration of an all-or-nothing approach. Fearing that permitting Reynolds a free exercise defense in a criminal polygamy prosecution would "permit every citizen to become a law unto himself" and practice "human sacrifices [if they] were a necessary part of [his] religious worship,"[92] the Court rejected Reynolds' defense. One is tempted to respond to such hyperbole with Justice Holmes' pithy aphorism: "[N]ot while this Court sits."[93] Indeed, so long as the Court, and not the religious practitioner, decides when, and the extent to which, the equities support his or her claim, there is *no* risk of allowing an individual to become a law unto himself or herself, to make a human sacrifice, or any other imaginary horrible.

Under the standards proposed in this article, I suggest that a court of the 1990s ought to deny any legal status to multiple religiously-motivated marriages, but forbid any criminal prosecution of one who engages in them. The reason for denying legal status is the potential impact such a status could have on the part of society that is structured in a monogamous manner. If polygamous marriages were legally recognized, one man's social security could support multiple wives, thereby creating an unfair, if not intolerable, burden on nonbelievers. Furthermore, such a benefit would have been unnecessary for Reynolds, whose religious beliefs only required him to have

---

homosexuals do not have right to engage in sodomy).

[91] 98 U.S. 145 (1879).

[92] *Reynolds*, 98 U.S. at 166-67. The Court held that evidence of the defendant's religion was inadmissible. *Id.*

[93] Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928). The Court, responding to the argument, called the power to tax the power to destroy. *Id.*

multiple wives in the sight of God, not Caesar.[94]

Criminal prosecution, however, for participating in a second or subsequent church marriage is another matter. From the defendant's perspective, it is the most direct and Draconian sanction possible, requiring him to chose between imprisonment in this life and damnation in the next. The need for such a sanction on behalf of the government is relatively trivial. The subsequent marriage has no legal validity; thus, it does not significantly harm the government. Any interest that the government may have in precluding communal or nontraditional lifestyles ranges between trivial and nonexistent.[95] Indeed, to the extent that a state permits a man and several women (or a woman and several men) to live together as a family without taking steps to regulate their sexual interaction, the only thing that the statute accomplishes is the preclusion of a religious ceremony.[96]

The result would (or should) be different where there actually is a human victim of the crime. For example, where a man fails to tell his first wife that he plans to marry a second wife and then claims a religious defense, the balance of equities may tilt in the other direction. An unsuspecting monogamous woman should not be powerless when victimized by her husband claiming to follow God's command. Similarly, a prospective second wife, who has not been informed of the first wife at the time of her marriage, should not be thwarted in a criminal prosecution of her apparent husband because of what he claims God commanded. When all of the parties have consented, however, the state's interest in prosecuting the polygamist should not be sufficient to outweigh his free exercise claim.

---

[94] *Reynolds*, 98 U.S. at 166-67.

[95] *See* Moore v. City of E. Cleveland, 431 U.S. 494, 498-500 (1977) (holding ordinance limiting dwelling unit to immediate family unconstitutional); Eisenstadt v. Baird, 405 U.S. 438, 454-55 (1972) (holding statute prohibiting distribution of contraceptives to single persons but allowing distribution to married persons unconstitutional).

[96] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993). One might even argue that *Lukumi* should prohibit a criminal prosecution, at least where the marriage only purports to be religious.

Prince v. Massachusetts[97] upheld the application of a child labor law to the guardian of a nine-year-old child, who permitted her ward (apparently at the ward's request) to join the guardian in distributing Jehovah's Witness literature; the child labor laws were applicable only because the ward charged between five and twenty-five cents to anybody who was willing to pay for the pamphlets. The factual scenario hardly suggested the underage newsboy to whom Betty Simmons (the ward) was analogized.[98] The issue in the case seemed to be whether to treat the state interest broadly (*i.e.* the evils of child labor) or narrowly (*i.e.* the need to keep the ward from distributing religious literature for small change in the presence of her aunt and guardian). If the Court had opted for the narrower viewing of State interest, as it should have, the result would (or certainly should) have been different.

Of course, religious speech need not and indeed ought not be treated *more* favorably than other speech. Consequently, if Betty Simmons had been distributing or even selling political, scientific, or other ideological literature that she supported, her aunt should not have been subject to prosecution. On the other hand, neutrality would not have been compromised by the prosecution of an underage newsgirl, whose reason for being there was exclusively to make money for herself and the newspaper and not to advance an ideological goal. The Court did not analyze the state's interest narrowly enough; thus, it unduly hampered the free exercise of religion without a sufficient gain for either the state or the nonadherent.

B. Braunfeld *and the Unemployment Compensation Cases*

In *Braunfeld v. Brown*,[99] a Saturday Sabbatarian failed to persuade the Court to grant an exemption from a Sunday closing law. The Court balanced the state's interest in quiet Sundays, the need to police the exemption, and the nonbeliever's interest in avoiding competitive disadvantage with the believer's interest in obtaining the exemption.[100] Although the Court did a better job of identifying the relevant factors than it did in *Prince*, its balancing left something to be desired.

---

[97] 321 U.S. 158, 166 (1944).

[98] Much less, Roland Dagenhart's children working long hours in a clothing sweatshop at the turn of the century epitomized the evils of child labor. *See* Hammer v. Dagenhart, 247 U.S. 251, 273 (1918).

[99] 366 U.S. 599, 605 (1961).

The Court correctly noted that Sunday closing laws only indirectly burdened Saturday Sabbatarians.[101] Unlike the convictions wrongly upheld in *Reynolds* and *Prince*, Sunday closing laws did not criminalize anybody's religious practice. Obviously, the case would have been different had there been a religious group before the Court that claimed a religious duty to work on Sunday.[102] On the other hand, to a significant degree, the state was responsible for the burden. This was not a case where the believer, because of time off for his religious beliefs, was unable to sustain himself and sought state aid to tide him over. Rather, Braunfeld alleged that without state interference he could run a thriving six-day-a-week business, but the Sunday closing law, in conjunction with his religious observance of Saturday, would force him out of business, causing him to lose his capital investment as well as his means of livelihood.[103] The directness of the burden probably should have been analyzed as less than the criminal penalties wrongly upheld in *Reynolds* and *Prince*, but more than mere taxes.

The only interests directly attributable to the State[104] against granting an exemption were the marginal disutility of the additional commercial character of Sunday caused by the open-for-business Sabbatarians, and the added enforcement difficulties generated by the need to police Sabbatarians to ascertain that they really were closed on Saturday.[105] In the grand scheme of things, these interests do not seem especially significant. Several businesses (convenience stores, etc.) were already open on Sunday. Consequently, the day did not start out as totally noncommercial anyway. While the additional commercialization of the city caused by Braunfeld and his religiously like-minded compatriots was not trivial, it does not seem all that significant either. The additional policing really is pretty trivial. If nothing else, Braunfeld's competitors, who are permitted to remain open only six days a week,[106] can be expected to turn him in should he flout both the law and his religion by opening seven days a week.

---

[100] *Braunfeld*, 366 U.S. at 608-09. The appellants also asserted the statute would hinder the religion from gaining new adherents. *Id.* at 602.

[101] *Id.* at 606. The Court noted the state would have to determine when the rights of one ended and those of another began. *Id.* at 604.

[102] While I am not aware of such claims, the ubiquity of potential religious claims is such that I would not preclude the possibility.

[103] *Braunfeld*, 366 U.S. at 601.

[104] This is contrasted with the state as representative of the nonbeliever's interest.

With regard to the nonbeliever's interest, the Court alluded to the mere possibility that the Sabbatarian by being open Sunday might have an advantage over his Christian or atheist neighbors, who were required to be closed on that day.[107] However, this possibility seems unlikely for two reasons. Primarily, we *know* that Braunfeld is at a competitive disadvantage *without* the exemption.[108] Second, there is no evidence that non-Sabbatarians wish to close on Saturday as a condition of opening on Sunday. The challenges to Sunday closing laws by non-Sabbatarians ask for the right to open seven days a week, not for a Sunday-Friday schedule.[109] Thus, the Court should not have accorded much weight to the non-Sabbatarian interest.

Although *Braunfeld* was a close case, it was probably wrongly decided. The burden on Braunfeld, though somewhat indirect, was substantial as the confluence of Braunfeld's duties to God and Caesar threatened to put him, and other similarly-situated persons, out of business or at least at a significant competitive disadvantage. The composite government and nonadherent interest was not very high; therefore, the law should have been invalidated.

---

[105] *Braunfeld,* 366 U.S. at 608.

[106] *See* McGowan v. Maryland, 366 U.S. 420, 422 (1961) (upholding Sunday closing laws); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582, 589 (1961) (same).

[107] *Braunfeld,* 366 U.S. at 608-09.

[108] There are fewer stores open on Sunday, but probably fewer people would choose to shop on that day.

[109] *See supra* note 106.

In contrast, *Sherbert* held that a Saturday Sabbatarian, discharged from her employment, had a free exercise right to unemployment compensation.[110] *Sherbert* was also a close case, made to appear easy by the Court's uncritical transformation of the compelling state interest test from the Court's free speech jurisprudence. The Court seemed oblivious to either the pervasiveness of potential religious claims[111] or the impact of the pro-religious result on nonbelievers.[112]

Comparing *Sherbert* to *Braunfeld* with regard to state interest is inconclusive. In *Sherbert*, the State was concerned with protecting the integrity of its unemployment funds from both fraudulent and non-essential use.[113] In *Braunfeld*, the concern was quieter Sundays and policing difficulties.[114] Although the Court in *Sherbert* held that the state interest in *Braunfeld* was more compelling, that proposition seems hard to believe.[115]

More significantly, the potential impact on non-believers was much greater in *Sherbert* than it was in *Braunfeld*. While one could debate the secular merits of a six-day work week, either excluding Sunday or Saturday, there was no reason to assume the superiority of one over the other. On the other hand, common sense suggests that a significant number of former five day workers might prefer unemployment compensation to a six-day work week. Indeed, South Carolina had explicitly held that one who had to leave her changed work schedule because of an inability to obtain adequate child care was *not* eligible for unemployment compensation.[116] Surely, such an individual would be sorely tempted to become a Sabbatarian to obtain the benefits that the Court says are constitutionally due Sherbert. When such temptation is realistically possible, the Court should employ considerable caution before upholding a free exercise claim.

---

[110] Sherbert v. Verner, 374 U.S. 398, 410 (1963). The Court held that South Carolina could not apply the disability provisions in an effort to constrain an individual to abandon her religious beliefs. *Sherbert*, 374 U.S. at 410. The Sabbatarian was left unemployed when the mill went from a Monday-Friday to a Monday-Saturday work schedule. *Id.* at 399 n.1.

[111] Although, this was obviously not a problem in *Sherbert* itself where the Court was dealing with an extremely traditional religious claim.

[112] The Court did consider and reject the argument that paying unemployment compensation to unemployed Sabbatarians violated the Establishment Clause. *Id.* at 409-10.

[113] *Id.* at 406-07.

[114] *Braunfeld*, 366 U.S. at 602-03.

[115] *Sherbert*, 374 U.S. at 408-09. Justice Brennan, who dissented in *Braunfeld*, authored the majority opinion in *Sherbert*. *Id.* at 399. Justice Brennan distinguished the cases based upon the state interests at issue by stating that the interest asserted in *Sherbert* is "wholly dissimilar to the interests which were found to justify the less direct burden upon religious practice in *Braunfeld*." *Id.* at 408.

A further factor militating against Sherbert's claim, as opposed to Braunfeld's claim, is the relative indirectness of her injury. Sherbert's unemployment was due to the action of the textile mill, not that of the state.[117] On the other hand, Braunfeld's inability to continue in business was the direct result of the Sunday closing statute of the State.[118] The State simply failed to aid Sherbert in precisely the same manner that it fails to aid those who are out of work because they can't find a baby-sitter.[119] Consequently, the State is more indirectly responsible for Sherbert's predicament than it was for Braunfeld's.

Notwithstanding these concerns, *Sherbert* was correctly decided because South Carolina had a statute precluding discrimination against Sunday Sabbatarians during those times when the mills were open on Sunday.[120] Although this statute was probably an unconstitutional establishment of religion,[121] the Court had not yet declared it to be such, and thus it was the law of South Carolina at the time Sherbert applied for compensation.[122] Protecting the job security of workers of the preferred religion while neglecting to provide unemployment compensation for workers of the disfavored religion is precisely the kind of discrimination that the Free Exercise Clause should not tolerate. Thus, on that narrow ground, *Sherbert* was probably correctly decided.

---

[116] Judson Mills v. South Carolina Unemployment Compensation Comm'n, 28 S.E.2d 535, 537 (S.C. 1944).

[117] *Sherbert*, 374 U.S. at 399 n.1.

[118] *Braunfeld*, 366 U.S. at 601-02. The statute forbid the retail sale on Sunday of certain listed commodities. *Id.* at 601 n.1.

[119] *See Judson Mills*, 28 S.E.2d at 537 (holding working mother to be unable and unavailable for work under State Employment Compensation Act, thus she was not eligible for benefits derived therefrom).

[120] *Sherbert*, 374 U.S. at 406.

[121] *See* Thornton v. Caldor, 472 U.S. 703 (1985) (finding law requiring employ-

An ironic impact of *Sherbert* is that unemployment compensation cases, notwithstanding the indirectness of the harm to religion, have become the *easiest* type of free exercise case to win. For example, in *Thomas v. Review Board,*[123] a Jehovah's Witness who believed that it was sinful to manufacture implements of war was transferred from a roll foundry to a turret tank manufacturing facility.[124] Rather than accepting work inconsistent with his religion, Thomas resigned and sought unemployment compensation, which was ultimately granted by the Supreme Court, in reliance on *Sherbert.*[125]

Thomas's case was, or should have been, easier for the claimant[126] than *Sherbert.*[127] The number of nonbelievers who would object to fabricating turret tanks but not to working in the roll foundry is likely to be small indeed. Conversely, the number of five-day-a-week nonbelievers, who would rather

---

er to always accommodate employees' Sabbath observance unconstitutional).

[122] *Sherbert*, 374 U.S. at 406.

[123] 450 U.S. 707 (1981).

[124] *Thomas*, 450 U.S. at 709-11.

[125] *Id.* at 713-14. The court noted that religious beliefs need not be acceptable, logical, consistent, or comprehensible to others to be afforded First Amendment protection. *Id.* at 714.

[126] Thomas first had to overcome the idiosyncratic character of his beliefs as other Jehovah's Witnesses perceived no inconsistency between their religion and turret tank manufacturing. Recognizing the individualistic, as well as pluralistic, nature of religion, the United States Supreme Court quickly dispatched this argument. The Court determined that while the idiosyncratic character of the belief may have been relevant to Thomas's credibility or sincerity, once those things were established, the idiosyncrasy of the belief became immaterial. *Id.* at 715-16.

[127] The actual holding of *Sherbert* was primarily predicated upon the inherent right of a Saturday Sabbatarian to receive unemployment compensation when fired for not working on Saturday. *Sherbert*, 374 U.S. at 410.

have unemployment compensation than work six days a week, is likely to be significantly greater. Consequently, in light of *Sherbert*, *Thomas* was clearly correct. This rationale would hold even if *Sherbert* had been decided the other way because of its impact on nonbelievers.

Hobbie v. Unemployment Appeals Commission of Florida,[128] however, was not correctly decided. Hobbie, who at the time maintained no religious aversion to Saturday employment, accepted a position that required such employment.[129] Subsequent thereto she became a Seventh Day Adventist, left her position, and sought unemployment compensation.[130] The Court, relying on *Sherbert*, sustained her claim.[131]

If the State had generally provided unemployment compensation for those who became dissatisfied with their original working conditions, Hobbie would, of course, have had a legitimate claim.[132] Because it did not, Hobbie was essentially billing the taxpayers for the lost opportunity costs occasioned by her religious conversion. Presumably, under *Hobbie*, an NFL quarterback who became a born-again Christian could receive unemployment compensation after being discharged for his failure to work on Sunday. Similarly, a taster at the sausage factory could receive unemployment compensation when her conversion to the Muslim faith precluded her from continuing in that line of work. It is difficult to comprehend how any fair balance of burdens between believer and nonbeliever can justify such an extension of *Sherbert*.

The final pre-*Smith* unemployment compensation case, *Frazee v. Illinois Department of Employment Security,*[133] was a fitting complement to *Sherbert*. Frazee, a generic Christian,[134] was denied unemployment compensation by the Illinois courts, which read *Sherbert* to be limited to minority religions. In an opinion that rejected the view that the Free Exercise Clause was only for minorities,[135] the Supreme Court upheld Frazee's claim.[136] Accepting *Sherbert* as a starting point, *Frazee* had to be decided as it was unless the Court was prepared to sanction discrimination against Christians. Had *Sherbert* not constitutionalized the right to across-the-board unemployment compensation for discharged Saturday Sabbatarians, *Frazee* should have been decided the other way due to the number of non-religious people who might prefer unemployment compensation to Sunday labor.

---

[128] 480 U.S. 136 (1987).

[129] *Hobbie*, 480 U.S. at 138.

[130] *Id.*

[131] *Id.* at 139-40.

[132] *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993) (holding legislators may not make laws, either overt or disguised, designed in opposition to certain religions or their practices).

[133] 489 U.S. 829 (1989).

C. The Amish Cases

Although the Amish cases, *Wisconsin v. Yoder*[137] and *United States v. Lee,*[138] are sometimes viewed as internally inconsistent,[139] they are not only totally consistent with each other, but taken together form perfect paradigmatic bookends of the best of free exercise jurisprudence. *Yoder* invalidated the conviction of several Amish who, in accordance with their religion, refused to send their fourteen and fifteen year-old children to school. *Lee* upheld the social security tax liability of an Amish employer predicated upon his employment of other Amish, notwithstanding the religious aversion of Amish to participating in either collecting or paying for social security.

At one level, *Yoder* was not a difficult case. The religious need for a back-to-the-farm life as opposed to a well-educated life was substantial—indeed, according to some testimony, critical to the survival of the Amish. The State's need for the additional two years of education, as applied to the Amish community, was not at all substantial. The community as a whole was apparently quite productive, and as the Amish children achieved adulthood, there was no evidence of unpreparedness for their lifestyle.

---

[134] *Frazee*, 489 U.S. at 830-31. The sect was not specified. *Id.* at 831.

[135] McConnell, *supra* note 19, at 1132.

[136] *Frazee*, 489 U.S. at 835. It also relied on the individualistic approach to religion in *Thomas*, refusing to penalize Frazee because of his lack of membership in any particular church. *Id.* at 833-34.

[137] 406 U.S. 205 (1972).

[138] 455 U.S. 252 (1982).

[139] For example, see Justice Stevens's opinion in *Lee*. *Id.* at 263 n.3 (1982) (Stevens, J., concurring) (stating that although precisely same religious interest was implicated in both cases, Court applied subjective balancing approach as demonstrated in *Lee* to allow exemption in *Yoder*).

There is another factor, however, that renders *Yoder* considerably more complex: the core of the Amish argument is that exposure to worldly ideas will cause Amish children to leave the Amish community. Stated differently, adherence to Amish tradition is dependent on ignorance; therefore, the Amish have a duty to keep their children ignorant lest they understand their real choices and leave the community. Obviously, this aspect of the Amish argument is anathema to another part of the First Amendment, the freedom of speech clause.

Although the question is close, the Court rightly resolved the case in favor of the Amish parents. If the children's physical well-being were held captive to their parent's religious philosophy, the better view would compel the parent's religious views to yield.[140] If the children, in fact, had a view contrary to their parents, *i.e.* they *wanted* to go to public school beyond age fourteen, the case for the State would be more powerful.[141] Because neither the children's physical well-being nor their personal perspectives conflicted with their parents' religious viewpoint, the question became whether Wisconsin or the Amish parents should control the religious and intellectual development of their children. Given our traditions of family control in this area,[142] coupled with an educationally-deprived

---

[140] *See* Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 201 A.2d 537, 538 (N.J. 1964) (holding that right of fetus to receive blood transfusion outweighed mother's contrary religious beliefs).

[141] *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 72-75 (1976) (holding that right of minor to receive abortion without parental objections outweighed parents' right to know about abortion); Bellotti v. Baird, 428 U.S. 132, 147-48 (1976) (same).

[142] *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (declaring statute forcing children to receive public education unconstitutional as it unreasonably

Amish child's ability to finish high school (and, if desired, college and graduate school) after achieving adulthood, the State's interest in compulsory education was not sufficient to override the contrary Amish interest.[143]

Because so few non-Amish would like to adopt an Amish lifestyle, the problem of apparent favoritism is not great. Although one might suppose a significant number of teenagers would like to drop out of school, there is no reason to believe that very many of their parents would actively support such a decision. Even fewer such parents are likely to be part of a community that emphasizes learning-by-doing and self-sufficiency, which are the hallmarks of the Amish community. There may be a small number of secular agrarians who would feel aggrieved and discriminated against by the *Yoder* decision, but in the absence of evidence to the contrary, I would not assume that they exist in very large numbers. Consequently, on balance, *Yoder* was correctly decided.

Lee is an altogether different kind of a case. I am inclined to agree with Justice Stevens' argument that the government's interest in forcing people into the social security system who would prefer to opt out and care for their own is not great.[144] However, we are dealing with an employer making such decisions for his employees. The federal government already allows a self-employed individual a religious opt-out from his own social security taxes and benefits. To allow an employer to make that choice for his employees can put undo pressure on the employee to accept no social security payments inasmuch as he would not be hired unless he so consented. Furthermore, such a rule would put a potential non-Amish employee at a competitive disadvantage in obtaining work from an Amish

---

interfered with parents' or guardians' right to direct upbringing and education of children under their control).

[143] The case is actually closer than the wrongly decided *Prince* case. The potential harm to the Amish children from not being exposed to other ideas is far greater than the potential harm to a child distributing religious literature in the presence of her guardian. *See* Prince v. Massachusetts, 321 U.S. 158, 168-70 (1944).

[144] United States v. Lee, 455 U.S. 252, 262 (1982) (Stevens, J., concurring).

employer because the employer *would* be required to pay her social security. Although it might be argued that the Amish employer would choose to hire other Amish anyway, that choice has to be made by the employer himself without influence from the government.[145]

Beyond the government interest in protecting Lee's employees, Lee's claim, if successful, could put his non-Amish competitors at a disadvantage. Other carpenters *are* required to pay their employees' social security. Consequently, exempting Lee could unfairly disadvantage them. The case would be entirely different if Lee or his employees wished *only* to opt out of *receiving* social security benefits. The government's interest in forcing him to take what he does not want simply is not great enough to be justified. Nobody, however, likes to pay taxes. When the government exempts religion from doing what hardly anybody *likes* to do, it maximizes the cost to nonbelievers. The United States rightly was not compelled to do that in *Lee*.

D. The Native American Cases

The results of the two major pre-*Smith* Native American cases, *Bowen v. Roy*[146] and *Lyng v. Northwest Indian Cemetery Protective Ass'n,*[147] were very much in accord with the standards suggested in this article. *Roy* potentially involved three issues: (1) could the federal government assign a social security number to one whose father believed that such an assignment would endanger her spirituality; (2) once assigned, could the government use her number as a condition of dispensing AFDC (Aid to Families with Dependent Children) benefits; and (3) once assigned, could the government condition receipt of benefits on the father's providing the government with that number. The Court found the first question moot because during litigation it was learned that the child had already been assigned a social security number. On the second question, eight of the nine Justices found that the government was justified in using the social security number that it had previously assigned.[148] Finally, certainly four out of seven, and probably five out of eight Justices held that Roy did *not* have to provide the social security number as a condition of obtaining benefits.[149]

---

[145] *Cf.* McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637, 641 (1950) (holding that presumed fact that white graduate students would choose not to associate with black classmate cannot justify state's intentionally segregating black student from his white classmates).

[146] 476 U.S. 693 (1986).

[147] 485 U.S. 439 (1988).

The Court's upholding of the government's power to employ social security numbers as a condition of doling out AFDC payments was predicated on the virtual per se right of government to ignore religious concerns in performing its own functions. As the Court so pithily put it: "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from government."[150] As we have already seen, because of the prevalence of potential religious beliefs that could infect virtually every area of government if not tightly cabined, this aspect of the Court's opinion was salutary indeed.[151]

The portion of the judgment upholding Roy's right not to provide his social security number was also salutary.[152] Arguing against this result, Chief Justice Burger, joined by Justices Rehnquist and Powell, argued that a religious claimant should not be immune from a reasonable neutral law where the claimant was seeking a government benefit.[153] In so holding, these Justices would have limited *Sherbert* and its progeny to cases in which the government had to conclude that the recipient's religiously-motivated conduct was "without good cause."[154] Although one can applaud the effort to cabin *Sherbert*, it is difficult to see why the government needs Roy to provide a number that it already has. Consequently, in balancing the government's interest in not having to check its computer as opposed to Roy's interest in not turning over the number, it is difficult to see why the government should win.

---

[148] *Roy*, 476 U.S. at 733 (White, J., dissenting). Only Justice White dissented on this point. *Id.* (White, J., dissenting).

[149] The questionable vote was Justice Blackmun, who thought that the question was not properly before the Court, but on the assumption that it was, he believed that the requirement was unconstitutional. *Id.* at 715-16. Given his rather unequivocal endorsement of that position, the five out of eight number is probably more accurate.

[150] *Id.* at 700 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

[151] *See supra* Part I.

[152] In referring to this as a judgment, I am counting Justice Blackmun's vote.

[153] *Roy*, 476 U.S. at 703.

On the other hand, Roy's victory is largely Pyhrric. The only reason that he does not have to provide a social security number is that the government already has one. His testimony seemed to indicate that once the number was given, or for sure, used, the damage was done. Nevertheless, the compromise forged by this case of taking the Free Exercise Clause seriously, but not too seriously, should be an instructive model for future courts to follow.

Lyng was a virtual replay of the first question in *Roy*. Justice Brennan, for himself and Justice Marshall, tried to distinguish it on the ground that land development typically requires hearings, and consequently the fear of every government action being subject to an oddball veto requirement was not as relevant.[155] Though somewhat persuasive, this point was rightly rejected. There is no constitutional requirement of land development hearings for land that the government already owns. Furthermore, land use decisions typically involve substantial balancing at many levels anyway, and to put a thumb on the scale for religious claims is precisely the type of burden nonadherents should not have to bear. If the interests that want a road built are more persuasive than the contrary interests, they should not be thwarted simply because the contrary interests include those who use the government's land for their own religious purposes.

An eminent domain taking of church property would present a different case. There the government would be acting to change the status quo in a manner detrimental to religion.

---

[154] *Id.* at 708.

[155] Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 470-72 (1988) (Brennan, J., dissenting).

Although the government should probably not *always* be forbidden to take religious property for a public purpose, it should be compelled to establish that the purpose for which the property is being taken is very important, and that there are no practical alternatives. One might argue that the suggested *Lyng*/eminent domain dichotomy bespeaks a western bias against a religion that is centered on devotion to, rather than ownership of, the land. Although true so far as it goes, this argument fails because the United States, its Constitution (of which the Free Exercise Clause is only a part), and its traditions all support the relevance of ownership. While it would be possible to develop a society where ownership did not matter, the United States is not such a society. Thus, the *Lyng* decision is sound, and it can be distinguished from a case of taking a church's property.

E. The Military and Prisons Cases

Litigation surrounding soldiers' and prisoners' rights to freely exercise their religion is, of course, freighted with the government's special need for control of and obedience from the soldier or prisoner. Obviously, this need compels the tolerance of at least some limitations that would not be tolerable in society at large. Such situations are quite amenable to the approach suggested in this article. The additional equities on the side of government must be weighed, but the search for an appropriate balance need not be compromised.

In *Goldman v. Weinberger*,[156] the Court held that an Orthodox Jewish Rabbi had no constitutional right to wear a yarmulke during his on-duty hours as an Air Force captain psychologist at an Air Force hospital. Because Goldman had the option of *not* being in the military, Justice Brennan's description of Goldman's plight as a denial of his "right to fulfill one of the traditional religious obligations of a male Orthodox Jew"[157] was not quite accurate. Rather, a correct statement of his plight would have been that he could not fulfill both his military *and* religious obligations.

---

[156] 475 U.S. 503 (1986).

[157] *Id.* at 513 (Brennan, J., dissenting).

The facts of *Goldman* are particularly compelling. Both during his training and early career, Captain Goldman wore his yarmulke with no adverse reaction from any military personnel. Subsequently, for reasons that smack of vindictiveness,[158] Goldman's commanding officer ordered him to discontinue wearing the yarmulke indoors, issued him a letter of reprimand, and finally threatened him with a court-martial if he continued wearing the yarmulke.

Because the government should never be able to interfere with religion to a greater extent than necessary, the *most* that the government should have been able to do in this case was to honorably discharge Goldman. The letter of reprimand and threatened court-martial were entirely unnecessary. Had Goldman, upon joining the Air Force, been aware of the anti-yarmulke rule and joined anyway, a letter of reprimand or court-martial may have been appropriate, but such was not the case.[159] Unfortunately, Goldman did not ask for rescission of the reprimand, nor an injunction against a court martial. Consequently, no such relief was considered by the Court, which by a five to four vote, rejected Goldman's claim that he had a right to wear his yarmulke while on duty.

The issue of the government's right to reject Goldman's religiously-motivated departure from uniform headdress was, as the vote indicated, an exceedingly close question. On the one hand, the military's need for this particular dress code is somewhat underwhelming, or so it seems to a lay person. On the other hand, the asserted military interest is the right to impose dress codes, not the utility of any particular one. Although to a non-military person, this interest seems insignificant, the military regards it as important. Given that Goldman would appear to have a potential career outside of the military, and that the military should be disempowered to discharge him in a less than honorable manner, I believe that the Court rightly tipped the balance in favor of the military.

---

[158] *See id.* at 504-05. Rabbi Goldman was first inducted into the military in 1973 and was placed on inactive status while obtaining his Ph.D. in psychology. Upon obtaining that degree three years later, he commenced active status as an Air Force psychologist. For five years, Goldman wore his yarmulke without incident. In 1981, he wore his yarmulke while testifying as a defense witness in a court-martial proceeding. Upon receiving a complaint from the prosecutor about Goldman's attire, his commander, Colonel Gregory, ordered him not to wear the yarmulke outside of the hospital, in which he spent most of his working hours. Shortly thereafter, Colonel Gregory received a protest from Goldman's attorney, whereupon Gregory expanded his original order to forbid Goldman's wearing of the yarmulke anywhere on base. *Id.*

[159] Although Goldman may have been aware of the regulation that forbade the indoor wearing of headgear (not clear from the record), he certainly had no reason to think that it would apply to his wearing a yarmulke in view of the number of years that he was permitted to wear it without complaint. *See supra* note 158.

This conclusion should be clearly conditioned on Goldman's right to an immediate honorable discharge. If he were a draftee (or even a volunteer) who was compelled to give months or years of additional service to the military and, from his perspective, disservice to God, the balance would be altogether different. A serviceman's inability to extricate himself from the service should tip the balance in favor of his free exercise claim. But so long as one can extricate himself from the dilemma of dishonor to God or country, *Goldman* was correctly decided.

Perhaps a downside to this reasoning is that the entire military can be culled of particular religious groups. Furthermore, the logic of this reasoning could even be extended to such non-uniform garments as Mormon underwear.[160] Nevertheless, what is or is not part of a necessary uniform appearance is a peculiarly inappropriate question for judges. On that score, it is encouraging that Congress, which clearly *is* an appropriate entity to oversee the military, saw fit to legislatively overturn *Goldman* and allow unobtrusive garments such as yarmulkes in the future.[161]

---

[160] The *Goldman* opinion tells us that the Air Force tolerates religious apparel that is not visible. *Goldman*, 475 U.S. at 509-10.

[161] 10 U.S.C. § 774 (1994). The statute states: "Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force." 10 U.S.C. § 774(a)

The leading prison case, *O'Lone v. Estate of Shabazz*,[162] was a similar closely-divided five to four victory for the government.[163] Contrary to many free exercise cases, the similarities between the majority and dissent exceeded the differences. Both opinions accepted the principle that prisoners retain some level of free exercise rights and the potentially conflicting principle that such rights could not prevail when prison discipline is threatened. The opinions differed only on issues of burden of proof and presumptions. The majority was willing to assume that the warden's protestation of prison necessity was sufficient[164] whereas the dissent would have compelled the warden to prove it.[165]

The potential for a claimed religious belief to disrupt normal prison life is boundless. Given the pervasiveness of both religious beliefs and prison regulations, some conflict seems inevitable. Considering the potential for serious conflict, the plaintiffs' claim in *O'Lone* was rather modest. The plaintiffs sought only to attend Jumu'ah, the Muslim Sabbath service, every Friday afternoon.[166] The prison officials claimed that such attendance would require either too much manpower or be too risky to prison security. The Court upheld the refusal to allow plaintiffs to attend Jumu'ah partially because of the effort made by prison officials to ensure Muslims some opportunity to exercise their religion.[167]

(1994).

[162] 482 U.S. 342 (1987).

[163] Justices Stevens and O'Connor switched sides in the two cases. O'Connor dissented in *Goldman* and voted with the majority in *O'Lone*. Stevens disagreed with her in both cases.

[164] *O'Lone*, 482 U.S. at 350. The majority declined to require prison officials to prove that the prisoners' religious rights could be accommodated without creating security problems. *Id.* The Court stated that the imposition of such a burden of proof would contradict the deference the Constitution allows for the judgment of prison officials. *Id.*

[165] *Id.* at 360-61 (Brennan, J., dissenting). Justice Brennan recognized the deference given to the judgment of prison officials but stated that an absolute deprivation of religious exercise requires more than a "mere assertion that such a depravation is necessary." *Id.* (Brennan, J., dissenting).

[166] *Id.* at 344-45. The Koran requires Muslims to attend Jumu'ah. *Id.* at 345.

[167] *Id.* at 352. Prison officials allowed Muslim prisoners to congregate for

Although both the majority and the dissent were somewhat sensitive to both government and free exercise interests, the balance should have tipped in favor of the prisoners. The prisoners did not have Captain Goldman's opportunity to leave the institution that limited their free exercise of religion, but the prisoners were less worthy than the captain because their own depredations put them in that situation. However, in *O'Lone*, prison officials refused to allow plaintiffs to attend Jumu'ah partially because of their *low risk*.[168] Furthermore, prison officials were willing to take whatever steps necessary to ensure Christian prisoners' right to attend Sunday services and Jewish prisoners' right to attend Saturday services.[169] Consequently, contrary to the warden's argument that arranging Muslims' schedules so that they could attend Jumu'ah would appear to favor Muslims, the prison's actual policy functionally discriminated against Muslims.[170] Thus, on balance, the Court should have upheld the Muslims' free exercise claim.

F. Employment Division v. Smith

In *Employment Division v. Smith*,[171] a case whose surprising opinion precipitated the rethinking of free exercise of religion, the Court clearly reached the correct result on the narrow facts of the case, but probably reached the wrong result on the broader question of the right to a religious exemption from anti-drug laws for the ceremonial use of peyote. Further, the Court clearly reached the wrong result under the constitu-

---

prayer, provided substitute meals when pork was served, and made special arrangements during Ramadan. *Id.*

[168] *Id.* at 350. The prison officials believed that low-risk and high-risk inmates should not be kept together. *Id.* Because of the attention paid to high-risk inmates, the personnel available to monitor Jumu'ah attendance for these low-risk inmates was not available. *Id.* at 350-51.

[169] *O'Lone*, 482 U.S. at 365 (Brennan, J., dissenting). Prison officials permit Jewish and Christian Sabbath ceremonies when the demand on the prison is greater than at any other time. *Id.* (Brennan, J., dissenting).

[170] *See* Cruz v. Beto, 405 U.S. 319, 322 (1972) (stating prisoners should be given reasonable opportunity to religious exercise comparable to opportunities afforded other prisoners of different religions).

[171] 494 U.S. 872 (1990).

tional theory espoused in this article regarding the right to *ever* obtain a religious exemption from generally applicable laws.

The case arose when two Native American Church members, Alfred Smith and Galen Black, were discharged from their employment as drug and alcohol rehabilitation counselors by a private rehabilitation firm.[172] Prior to commencement of employment, each was aware of the firm's policy against drug or alcohol use.[173] Notwithstanding, each plaintiff intentionally ingested peyote in a religious ceremony with the knowledge and specific prior disapproval of his employer. Thereafter, Smith and Black were fired.

Given the bona fide job criteria[174] and the knowledge of the non-ingestion of peyote rule, it seems hard to justify granting unemployment compensation under *Sherbert.*[175] *Smith* is also distinguishable from *Hobbie*, where the Court wrongly allowed unemployment compensation to one whose *post-employment* conversion precluded her working on Saturdays, upon which she had previously contracted to work.[176] Rather, *Smith* is truly analogous to the NFL quarterback, who because of his devout Christian beliefs will not work on Sunday, or a Muslim, who will not work as a taster at the sausage factory, *both of whom were aware of the conflict when accepting the employment.* At least in *Hobbie*, the employee was able to fulfill the terms of her employment at the time that she was hired; only her subsequent conversion changed that. Smith and Black's claims are that even though they knew that their religion was incompatible with the employment they sought, they were entitled to take the position, be fired because of its incompatibility with their religious beliefs, and claim unemployment compensation because of the firing. The Free Exercise Clause should not accede to such an extravagant claim, and the Court should have had no difficulty rejecting it.

---

[172] *Smith,* 494 U.S. at 876. Smith and Black argued that the Oregon Department of Human Resources's Employment Division's refusal to provide unemployment compensation violated the Free Exercise Clause. *Id.*

[173] Employment Div. v. Smith, 485 U.S. 660, 663 n.3 (1988). The language of the policy was couched in terms of abuse:

> In keeping with our drug-free philosophy of treatment and our belief in the disease concept of alcoholism, and associated complex issues involved in both alcoholism and drug addiction, we require the following of our employees:
>
> 1. Use of an illegal drug or use of prescription drugs in a nonprescribed manner is grounds for immediate termination from employment.
>
> . . . .
>
> 3. Any use of alcohol by recovering staff will not be allowed, and is grounds for immediate disciplinary action, up to and including termination. Use shall be defined as any ingestion of an alcoholic beverage in any situation.

Smith, 485 U.S. at 663. It was clear that the employer regarded any use of drugs or alcohol as an abuse of that product. Indeed, the employer testified at Black's trial that even ceremonial wine use by a Catholic at communion would be grounds for dismissal. Black v. Employment Division, 721 P.2d 451, 452 (Or. 1986).

[174] It is, of course, arguable that a drug rehabilitation counselor need not be drug and alcohol free, so long as he can control his ingestion of it. Nevertheless, it is surely bona fide for a particular center to insist on total abstinence.

[175] *See* Sherbert v. Verner, 374 U.S. 398, 410 (1963) (finding employee entitled to unemployment compensation when change in work schedule required employee to work on sabbath); *supra* Part VI B.

The more significant and difficult question, unnecessarily resolved by the Court, was whether a religious exemption for the ceremonial use of peyote was required by the Free Exercise Clause. Enough of the populace would like to use drugs that if a generic religious exemption were granted for drug use, religions permitting such use would probably become artificially more attractive, or just created out of whole cloth. While the bona fides of such beliefs could presumably be tested,[177] creating the necessity of such a procedure is certainly unattractive. Furthermore, the unadorned right to use drugs would appear to be an unacceptably favorable treatment of religion to those who would either use drugs if lawful, or who would use drugs illegally and risk criminal conviction.

Smith, however, was not about the unadorned right to the ceremonial use of drugs. Rather, it was about the right to use peyote, a rather bitter drug that hardly qualifies as the drug of choice among drug connoisseurs.[178] Moreover, it was about the right to use peyote under highly controlled circumstances, a highly formal ceremony during which the peyote users are monitored by nonusers who can assist should any problem arise.[179] Furthermore, under the rules of the religious tradition at issue, use of peyote outside of this highly limited circumstance is sinful and forbidden. Consequently, the number of nonbelievers who would feel discriminated against by the claim in this case should be small indeed.

---

[176] Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 138 (1987); *see supra* Part VI B.

[177] *See* United States v. Seeger, 380 U.S. 163, 164-65 (1965) (testing validity of religious beliefs of conscientious objectors to military service); United States v. Ballard, 322 U.S. 78, 86 (1944) (holding jury could consider whether defendant really believed religious representations in assessing guilt for mail fraud).

Yoder is perhaps the best analogue to *Smith*.[180] The Court did not simply grant the Amish a First Amendment right to not attend school. Rather, it permitted them to substitute the last two years of school for a learning-by-doing program with a proven track record. Similarly, by focusing on the precise nature of the Native American Church's claim as opposed to the more generic right to use drugs claim, the balance favors granting the exemption to Native American Church members.[181]

VII. A GLIMPSE AT THE FUTURE

Were the Court to adopt a balancing standard similar to that suggested in this article, free exercise claims for an exemption from generally applicable laws would have a forum in which to be heard. They would not, however, always, or even usually, prevail. Serious attention would be paid to the insubstantiality or indirectness of the religious claim, and the substantiality of the governmental and/or nonbeliever's argument against the claim. Ultimately, a careful balance would be necessary.

---

[178] *Smith*, 494 U.S. at 909-10 (Blackmun, J., dissenting). Justice Blackmun stated that the plaintiffs' free exercise interest should be weighed against the State's narrow interest in prohibiting ceremonial use of peyote rather than the State's broad interest in fighting the "war on drugs." *Id.* (Blackmun, J., dissenting); *see* People v. Woody, 394 P.2d 813, 818 (Cal. 1964) (discussing state interest in prohibiting the ceremonial use of peyote).

[179] *See supra* note 36 and accompanying text.

[180] *See supra* Part VI C.

[181] *See* 42 U.S.C. § 1996(a) (1994) (establishing federal policy to protect Native Americans' right to worship through ceremonial and traditional rites); OR. REV. STAT. § 475.992(5) (Supp. 1998) (providing religious use as affirmative defense in prosecution for manufacture, possession or delivery of peyote); *Woody*, 394 P.2d at 821-22 (holding plaintiff's right to ceremonial use of peyote outweighed state's interest in prohibiting such use).

A. Religious Landlord and Fornicating Tenants

A recent problem faced by state courts (applying state constitutional versions of free exercise)[182] regards the manner in which to balance the right of a landlord, whose Christian beliefs preclude renting to unmarried heterosexual couples, with the right of the couple to housing and the right of the State to enforce its anti-discrimination laws. Two recent cases from Alaska and California have approached this problem. Although each court found against the landlord, I believe there were significant differences in the cases. In my view, Alaska got it right and California may not have.[183]

In the Alaska case, Swanner, who owned a property management company in Anchorage, regularly refused to rent to unmarried individuals who, in response to his question, indicated that they intended to live with a person of the opposite sex. Because Swanner's conduct constituted a violation of Anchorage's fair housing ordinance, the disappointed tenants filed suit. The Alaska Supreme Court rejected Swanner's free exercise of religion claim and found for the would-be tenants.[184]

The *Swanner* approach closely approximates the approach suggested in this article. Swanner did not lose his case by a simple citation to *Smith*. Indeed, the court explicitly reaffirmed an earlier Alaska Supreme Court case, *Frank v. State*,[185] in which the court upheld the right of an Athabascan Indian to take moose out of season in order to perform an important religious ritual. In *Swanner*, however, the balance was different. While Swanner had a religious duty to refrain from promoting fornication, he had no religious duty to engage in the highly regulated property management business. In that regard, he was no different from an Orthodox Jew who takes a job tasting sausage on Saturday, or a Native American who takes a job as a drug rehabilitation counselor. The significance of *Swanner* is that free exercise of religion received a fair hearing. It was neither beaten down without any balancing (*Smith*) nor artificially inflated over other serious, but perhaps not "compelling," interests.

---

[182] State free exercise provisions, of course, can be more expansive than the Federal Free Exercise Clause as announced in *Smith.*

[183] However, some of the reasoning, particularly in the California case, left something to be desired.

[184] Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 285 (Alaska 1994), *cert. denied,* 513 U.S. 979 (1994). The court concluded that Swanner could not discriminate on the basis of marital status and Swanner was not entitled to a free exercise exemption from applicable anti-discrimination laws. *Swanner,* 874 P.2d at 285.

In the California case, Smith, a widow who owned two duplexes, whose rent provided her primary source of income, shared Swanner's religious views in regard to the sin of facilitating fornication.[186] Indeed, her testimony indicated that she would leave the premises unrented and forego her income from them, rather than rent to an unmarried couple. Consequently, she refused to rent to such a couple. The California Supreme Court found for the unmarried tenants and against the landlord.[187]

The court's opinion, relying on RFRA, tracked the reasoning of *Swanner*, holding that Smith could invest her money in something other than real property. Because of her ability to redirect her capital in a manner that did not compel her to rent to fornicators, the court concluded that her religious rights were not substantially impaired.

Although I applaud the court's balanced approach to the problem, including its concern for the impact of Smith's religious beliefs on her tenants, it would have been better for the court to have assessed the minimal impact of a small property owner's[188] religious beliefs on the rights of fornicating tenants. It is at least possible that if Smith's small number of units were taken into account, the result would have been different. A widow, like Smith, with four units of property cannot wreak the same kind of havoc as a property management company with a much larger number of rental units.

---

[185] 604 P.2d 1068 (Alaska 1979).

[186] Smith v. Fair Employment and Housing Comm'n, 913 P.2d 909, 912 (Cal. 1996). Smith believed it was a sin for her to rent her property to people who would engage in nonmarital sex on her property. *Smith*, 913 P.2d at 912.

[187] *Id.* at 931. The court analyzed the landlord's claim under the Federal Free Exercise Clause, RFRA and the California free exercise provision. *Id.* at 919, 921, 929. The claim failed under each theory. *Id.* at 919, 929, 931.

B. Cases with Room for Compromise

One advantage of the proposed balancing of equities test is that it encourages compromise. Under *Smith*, a state knows that it is under no obligation to accommodate religion. Consequently, it is unlikely to even try. Similarly, under RFRA, if the State's interest is not compelling, it cannot prevail, and the religious interest is unlikely to seek compromise.

Boerne is a good example of how established free exercise jurisprudence reduces the possibility of compromise. The City was primarily concerned with preserving the facade of the church for historic and aesthetic reasons. While the church sought to tear down the entire structure,[189] the City contended that the church could not expand even if it preserved the facade.[190] Obviously, the best solution would have been to allow the church to expand while retaining the historically and aesthetically important facade. Such a result would have been a substantial win-win situation without the cost of, excuse the expression, making a federal case out of it.[191]

Similarly, in *Cheema v. Thompson*,[192] the Ninth Circuit

---

[188] She only owned four units (two duplexes).

[189] Brief for Petitioner at 4, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (No. 95-2074), *available at* 1996 WL 689630, at *4.

[190] Brief for Respondent at 1, City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (No. 95-2074), *available at* 1996 WL 10293, at *1.

[191] Apparently, such an accord was achieved by the parties after the Supreme Court's decision. *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 163 (1997).

[192] 67 F.3d 883 (9th Cir. 1995).

Court of Appeals held that the school board was required to try to reach an accommodation with Sikh children who sought to carry a kirpan[193] to school for religious reasons.[194] Among other alternatives, the court approved dull knives in tightly sewn sheaths making removal of the kirpan difficult.[195] Judge Wiggins, in his dissent, thought that no compromise would work because the Sikhs insisted on real knives as opposed to toy knives, while the school district thought that the presence of a real knife, even dulled and tightly sewn, was an unacceptably high risk.[196] Both the court and the dissent addressed the proper questions. Because the case was a pre-*Boerne* case brought under RFRA, the court was too solicitous to the religious claim and insufficiently attuned to the needs of the school.

The School Board had offered to allow knives riveted, as opposed to merely sewn, to the sheaths.[197] Because the knives would then be impossible to use as knives and would thereby lose their character as kirpans, the plaintiffs found this solution unacceptable.[198] Given that the children in this litigation were ages seven, eight, and ten, respectively, and further given that they were permitted by their religion to use the knives for defensive purposes when in their youthful judgment it was necessary,[199] one can appreciate the School Board's claim that possession of a kirpan under such circumstances compromised the safety and security of the student body.[200] On the other hand, if the Sikhs would have been willing to accept riveted knives, as they apparently had in other California School Districts,[201] or rubber knives, they should have prevailed, even if the school board would have preferred that those alternatives also be banned.

---

[193] A kirpan is a curved, steel blade carried in a sheath. *Cheema*, 67 F.3d at 883 n.13.

[194] *Id.* at 886.

[195] *Id.*

[196] *Id.* at 888, 890 (Wiggins, J., dissenting).

[197] *Id.* at 888 (Wiggins, J., dissenting).

[198] *Id.* (Wiggins, J., dissenting).

[199] *Id.* at 886-87 (Wiggins, J., dissenting).

[200] Judge Wiggins noted that Sikhs are not permitted to wear kirpans on airlines or in court. *Id.* at 890 n.3 (Wiggins, J., dissenting). And, of course, one need not recount the current spate of school violence to appreciate the special danger of children and weapons.

Again, the advantage of the proposed balancing of equities over either of the typically defended tests is apparent. Under *Smith*, the School Board is under no obligation to take the Sikh's claim seriously.[202] Under RFRA, the risk of overvaluing the religious interest, vis-a-vis that of the State, is unacceptably high as the majority opinion in *Cheema* so clearly demonstrated.[203]

C. The Outer Limit of Establishment

Obviously, any free exercise claim is limited by the Establishment Clause. For example, to the extent that an accommodation for religion would violate the Establishment Clause, it cannot be compelled by the Free Exercise Clause. In *Texas Monthly, Inc. v. Bullock*, a fractured Court gave us some clue as to the line.[204] Basically, it held that where the benefit to religion removes no significant impediment to free exercise, yet favors religion at the expense of a comparably situated activity, the Establishment Clause is violated.[205] In *Texas Monthly*, the Court concluded that a sales tax exemption for religious texts did not remove a significant free exercise impediment, but the exemption did discriminate in favor of religion.[206] Consequently, the Court invalidated the exemption.[207]

---

[201] Two other California school districts managed to accommodate a Khalsa Sikh population by allowing kirpans riveted to their sheathes. *Id.* at 885 n.3.

[202] Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990). The Court stated that an individual's religious beliefs, which contradict relevant concerns of society, did not relieve the individual from complying with an otherwise valid law. *Smith*, 494 U.S. at 879.

[203] *Cheema*, 67 F.3d at 885-86.

[204] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 5 (1989). Justice Brennan wrote the plurality opinion, which Justices Marshall and Stevens joined. *Texas Monthly*, 489 U.S. at 5. Justice White wrote an opinion concurring in the judgment. *Id.* at 25 (White, J., concurring). Justice Blackmun wrote an opinion concurring in the judgment, which Justice O'Connor joined. *Id.* at 26 (Blackmun, J., concurring). Justice Scalia wrote a dissenting opinion, which was joined by Chief Justice Rehnquist and Justice Kennedy. *Id.* at 29 (Scalia, J., dissenting).

[205] *Id.* at 15-18.

Justice Stevens would have resolved *Boerne* on this principle. He argued: "If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid enlargement of the structure."[208] I disagree because free exercise of religion is explicitly protected by the Constitution. Consequently, it makes sense that the exercise of religion will receive some benefits that less protected activity does not receive. When those benefits remove an impediment to the actual exercise of religion, it is understandable that free exercise will be protected. When the statute merely exempts religion from a financial obligation that similarly-situated entities must pay, the Establishment Clause applies and forbids the exemption.[209] Although the church may benefit financially by not having to build a new church,[210] there is also a spiritual component to being allowed to expand and remain on its hilltop sanctuary. It is this spiritual component that precludes Establishment Clause resolution and remands to free exercise analysis.

A case posing as a federal RFRA case, *Christians v. Crystal Evangelical Free Church*,[211] probably should be decided as an establishment case. The case arose when Bruce and Nancy

---

[206] *Id.* at 18-21.

[207] *Id.* at 25, 29. In referring to the Court, I am combining the Brennan opinion, which was joined by Justices Marshall and Stevens, and the Blackmun opinion, which was joined by Justice O'Connor.

[208] City of Boerne v. Flores, 117 S. Ct. 2157, 2172 (1997) (Stevens, J., concurring).

[209] This is not inconsistent with *Walz v. Tax Commission of New York*, which upheld an exemption from property tax for church-owned property used exclusively for religious purposes. Walz v. Tax Comm'n of New York, 397 U.S. 664, 680 (1970). In *Walz*, the exemption in question also applied to other similarly-situated non-profit organizations. *Walz*, 397 U.S. at 666-67.

[210] *See* Eisgruber & Sager, *supra* note 24, at 105 (stating that church expansion "may be quite expensive and inconvenient to the church.").

[211] Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854 (8th Cir. 1998).

Young, while insolvent, tithed $13,450 during the year preceding their bankruptcy petition.[212] Arguing that the Youngs had not received equivalent value for this transfer, the trustee in bankruptcy sought to obtain this money from the church.[213] Although seeming to discuss every issue under the sun except the Establishment Clause,[214] the Eighth Circuit held that under RFRA, which it found to be constitutional as to the federal government,[215] the government's interest in recovering the amount of the tithe was not compelling.[216] Hence, it allowed the Youngs' church, Crystal Evangelical Free Church, to keep the tithed funds as against the claim of the trustee in bankruptcy.[217]

---

[212] *Christians*, 141 F.3d at 857.

[213] *Id.*

[214] The Court did discuss whether RFRA itself violated the Establishment Clause, and rightly concluded that it did not. *Id.* at 861-63. But, it did not discuss whether giving a special benefit to the trustee in bankruptcy would constitute an establishment of religion irrespective of RFRA.

[215] *Id.* at 863. With apologies to my very helpful colleague, Professor Eugene Gressman, I agree with the Eighth Circuit's conclusion that RFRA is constitutional as applied to federal legislation. *See* Eugene Gressman & Angela Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L. J. 65, 137-38 (1996) (questioning the constitutionality of RFRA as applied to federal legislation); Eugene Gressman, *The Necessary and Proper Downfall of RFRA*, 2 NEXUS: A JOURNAL OF OPINION 73, 81-84 (1997) (concluding that RFRA is unconstitutional as applied to federal legislation). *Boerne* involved an attempt to impose a nonconstitutional disability on the States in contravention of what the Court thought were appropriate principles of federalism.

Although Congress lacks power to extra-constitutionally limit state power, it surely has the power to limit the impact of its own statutes. Thus, if Congress wishes to say: "We do not wish any of our statutes to be applied in a manner substantially limiting somebody's religious freedom unless it is the least restrictive means of implementing a compelling state interest," it is difficult to see what constitutional provision precludes that. Separation of powers precludes the Congress from excessive tinkering with constitutional rules and standards, but it does not preclude the Congress from voluntarily limiting the reach of its own statutes.

The establishment of religion clause, as construed by Justice Stevens, would preclude such a law. However, Justice Stevens stands alone in his construction of the Establishment Clause. Furthermore, RFRA, by its terms, is inapplicable when adherence to the religious claim would constitute a violation of the Establishment Clause. The religious claim in *Christians* should lose, not because RFRA violates the Establishment Clause, but because the religious claim, itself, violates the Establishment Clause, and hence is not protected by RFRA.

Although I have concluded that RFRA is constitutional, I would hope that the Court takes RFRA's citation of *Yoder* seriously and construes the compelling interest test with the kind of sensitivity invoked in that case.

[216] *Christians*, 141 F.3d at 857.

Initially, it is difficult to understand how the Youngs vis-a-vis the church, can be considered the real party in interest. Regardless of the result, the Youngs have made their tithe. They have no cognizable interest in what the Church does with the money. Presumably, if the Church were sued by a contractor, whom the Youngs believed performed less than acceptable work, they would have no complaint if the Church used their tithe to pay off the judgment. Furthermore, if the Youngs had obtained the money in a bank robbery, there surely could be no claim that their right to tithe was denied when the bank traced the tithed money to the proceeds of the robbery. Indeed, if the Youngs did not want their transfer set aside, they presumably could have refrained from declaring bankruptcy and forfeited the benefits of a discharge in bankruptcy.[218] They simply had no right to spend that which, because of their decision to go the bankruptcy route, they did not own.

In regard to the real party in interest, it is hard to see how the church's claim to an exemption from bankruptcy principles is any greater than the various churches' claim to an exemption from sales tax in *Texas Monthly*. To the extent that the dollar amount is greater in *Young*, the religious-favoring character of the differential treatment is exacerbated. Furthermore, unlike *Texas Monthly*, where the religious books received only a modest benefit vis-a-vis its competitors, the Crystal Evangelical Free Church, which was found to have not given fair value for its tithe, will benefit at the expense of those creditors who did give the Youngs something of value for which they will receive less in return. A clearer establishment of religion is difficult to imagine. Thus, the Supreme Court should reverse *Christians* on the ground that no RFRA or free exercise claim can trump the Establishment Clause.[219]

---

[217] *Id.*

[218] To be sure, some bankruptcies are forced, but the evidence does not appear to indicate that this was one of them. *Id.* at 857.

VIII. Conclusion

The judiciary and the academy have been embroiled in a dispute over a false dichotomy. Some maintain that in the absence of discrimination against or targeting of religion, a free exercise claim should never prevail. Others maintain that except in unusual situations,[220] free exercise claims should always prevail. Both sides have, at least rhetorically, eschewed the sensible middle course proposed in this article. The good news is that many of the post-*Sherbert*, pre-*Smith* decisions have formally applied the compelling state interest test, but they have substantively adopted something close to the test suggested in this article.[221] Now that the *Sherbert* test has been formally abandoned and RFRA has been held unconstitutional, at least in regard to State cases, it is time to take Justice Souter's call for rethinking the entire area of law seriously.[222]

In another context fifteen years ago, the current Chief Justice said:

> "Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is not achieved by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of government authorities. The task of this Court, as of other courts, is "to hold the balance true."[223]

In a similar vein, more than thirty years ago, I wrote, also in another context: "The scales of justice will not balance with false weights on either side."[224] With the ubiquity of potential free exercise claims, one can hope that the Supreme Court will indeed soon avail itself of the opportunity "to hold the balance true."

---

[219] Indeed RFRA says as much. 42 U.S.C. § 2000bb-4 (1994).

[220] These situations include when government seeks to implement a compelling interest in the least restrictive manner.

[221] Certainly the Amish cases, *Yoder* and *Lee*, did that. *See supra* Part VI C.

[222] Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 559 (1993) (Souter, J., concurring) (stating that "in a case presenting the issue, the Court should reexamine the rule *Smith* declared.").

[223] Illinois v. Gates, 462 U.S. 213, 241 (1983).

---

[224] Arnold H. Loewy, *Free Speech: The "Missing Link" in the Law of Obscenity*, 16 J. PUB. L. 81, 81 (1967). Regrettably, the Court has not yet fixed the problem identified in that article. Hopefully, it will react a little quicker to this one. But do not count on it.

CONSTITUTIONAL REMEDIES, SECTION 1983 AND THE COMMON LAW

Michael Wells[*]

Constitutional tort law marries the substantive rights granted by the Constitution to the remedial mechanism of tort law. The sweeping language of 42 U.S.C. § 1983 provides that "[e]very person who, under color of any [state law] subjects, or causes to be subjected, any [person] to the deprivation of any [constitutional rights] shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."[1] Constitutional tort suits raise, in a new context,

---

[*] J. Alton Hosch Professor of Law, University of Georgia. The author wishes to thank Thomas Eaton, John Jeffries, Richard Nagareda, and Sheldon Nahmod for helpful comments on a draft of this article.

[1] 42 U.S.C. § 1983 (1994). Enacted in 1871, 42 U.S.C. § 1983 lay largely dormant for ninety years, partly because there was a dearth of substantive constitutional rights for much of that period. Louise Weinberg, *The* Monroe *Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737 *passim* (1991). Also, courts read "under color of" as meaning that a remedy was available only where the state authorized an officer's unconstitutional conduct. Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 279-87 (1965). Litigation under 42 U.S.C. § 1983 began to expand after the landmark decision in *Monroe v. Pape*, where the Supreme Court created a broad remedy for violations of rights by any person acting under pretense of state authority, even if state law also afforded relief. Monroe v. Pape, 365 U.S. 167, 174 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978). The amount of 42 U.S.C. § 1983 litigation has steadily grown in the past four decades. *See* RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1121-22 (4th ed. 1996).

Although there is no statute generally authorizing constitutional tort suits against *federal* officers, the Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, recognized a cause of action implied from the Constitution. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 395-96 (1971). *See also* FALLON ET AL., *supra*, at 858-77. The parts of this article that relate to the interpretation of 42 U.S.C. § 1983 are not relevant to these so-called *Bivens* suits, but the general thesis of the article—that many tort-like remedial questions relating to causation, immunity, and damages—and therein lies a problem. The usual source of answers to questions raised by a statutory remedy is the statute itself. But referring to the text of this statute is unavailing, because it does nothing more than authorize a remedy. Since section 1983 does not provide answers to the remedial questions that arise in tort suits, the Supreme Court has looked to the common law in resolving them. The Court said in *Monroe v. Pape* that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[2] In the years since *Monroe*, the Court has repeatedly declared that the statute creates "a species of tort liability,"[3] and has routinely employed concepts from the common law in resolving remedial issues.[4] The Court has, in effect, erected a presumption in favor of the majority common law rule, subject to override based on strong constitutional tort policy considerations.[5]

---

the Court should not give presumptive force to the common law of torts—does apply to them.

[2] *Monroe*, 365 U.S. at 187. *See* Sheldon Nahmod, *Section 1983 and the Background of Tort Liability*, 50 IND. L.J. 5, 6 (1974).

[3] *E.g.*, Heck v. Humphrey, 512 U.S. 477, 483 (1994); Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305 (1986); Smith v. Wade, 461 U.S. 30, 34 (1983); Carey v. Piphus, 435 U.S. 247, 253 (1978); Imbler v. Pachtman, 424 U.S. 409, 417 (1976).

[4] *See, e.g.*, Bogan v. Scott-Harris, 118 S. Ct. 966, 970-71 (1998); Richardson v. McKnight, 117 S. Ct. 2100, 2103-05 (1997); Buckley v. Fitzsimmons, 509 U.S. 259, 268 (1993); Burns v. Reed, 500 U.S. 478, 493-94 (1991); Town of Newton v. Rumery, 480 U.S. 386, 392 (1987); Malley v. Briggs, 475 U.S. 335, 339-40, 344-45 n.7 (1986); Tower v. Glover, 467 U.S. 914, 922-23 (1984); Pulliam v. Allen, 466 U.S. 522, 539-40 (1984); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 417 (1979); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285-87 (1977); Pierson v. Ray, 386 U.S. 547, 554 (1967).

[5] *See, e.g.*, *Richardson*, 117 S. Ct. at 2103; *Buckley*, 509 U.S. at 268-69; *Malley*, 475 U.S. at 339-40; *Smith*, 461 U.S. at 34; *Fact Concerts*, 453 U.S. at 258-59.

A number of commentators also seem enamored of the common law. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051-52 (1989) (approving use of common law rules in fleshing out open-textured statutes like 42 U.S.C. § 1983); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts,* Some of the opinions indicate that 1871 tort law is the benchmark,[6] while others look to modern tort developments as well.[7]

My thesis is that, in erecting a presumption in favor of the common law, the Supreme Court has taken the wrong path.[8] Instead of treating the common law as a source of constitutional tort law, it should think of constitutional tort as a fundamentally different legal artifact from common law tort. The Court should devise rules that reflect the distinctive features of damage suits aimed at vindicating constitutional rights. Rather than using the common law of torts as the model for constitutional tort, the Court ought to conceive of the backward-looking relief available in constitutional tort as part of the system of constitutional remedies, serving as a vehicle for filling in gaps left by forward-looking injunctive and defensive remedies. I do not mean to assert that the common law is not worthy of study. On the contrary, constitutional tort could hardly do without the concepts and vocabulary of the common law. The remedial questions raised by constitutional damages suits resemble common law tort issues. In resolving them, the Court will find useful ideas in the common law, as well as from treatises, theoreticians, and other legal systems. But the

---

75 VA. L. REV. 1461, 1466-70 (1989) (stating that "[d]amages actions for violations of constitutional rights are in many respects analogous to ordinary tort actions."); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 760 (1992) (suggesting that courts "borrow[] from contemporary tort law to flesh out not only ancillary procedural and remedial gaps but also [section 1983's] most basic standards of liability and defense."); Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242, 1281 (1979) (recommending rules that do not "depart[] from established common law principles").

[6] *E.g.*, Owen v. City of Independence, Mo., 445 U.S. 622, 638 (1980).

[7] *See* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 65-66 (1989); *Smith*, 461 U.S. at 34 n.2 (1983).

[8] I am not the first to address these issues. For a pioneering effort in the area, see Nahmod, *supra* note 2. *See also* Sheldon Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719 (1989). In the latter article, Professor Nahmod argues that, independent of the borrowing of tort doctrines, the use of tort rhetoric is itself a bad thing, because it encourages courts to limit the scope of liability in various ways. *Id.* at 1739-50.

common law is not appropriately viewed as a "source of the law"[9] for constitutional tort rules. In other words, the Court should pay attention to the common law, but should not defer to the common law, and should never adopt a rule solely *because* it is a common law rule.

Part I describes the Court's use of common law doctrines in constitutional tort cases. One may attempt to justify the practice in two ways, either as a matter of the Court's obligation to follow Congressional directives, or as an exercise of judicial discretion in interpreting an open-textured statute. Part II argues that 42 U.S.C. § 1983 does not oblige the Court to adopt common law rules. Part III maintains that the Court should not borrow the common law as a source of answers to constitutional tort questions. Part IV discusses some concrete doctrinal implications of abandoning the common law model.

I. HOW THE SUPREME COURT USES THE COMMON LAW

The relationship between constitutional torts and the common law is complex and multi-faceted. In sorting out the issues, it is useful to begin with a crucial distinction between two parts of a constitutional tort case. These are (a) the content of constitutional rights and duties; and (b) the various remedial questions that arise once a constitutional violation has been established. These two aspects of a constitutional tort case differ in a fundamental way. The breach-of-duty problem is itself a constitutional issue. Resolving it requires the Court to consider the range of institutional concerns about the Court's role in the government. A decision that a given action is a breach of constitutional duty amounts to a holding that the plaintiff has a constitutional right, which the legislature cannot nullify. The remedial side of the case raises issues like causation, immunities, and damages, which need to be decided only when a breach of duty has been established. Judicial rule-making on these topics may be displaced by legislative judgments favoring other remedial arrangements.[10]

---

[9] As Justice Powell's opinion for the Court described it in *Rumery*, 480 U.S. at 392.

A. Constitutional Rights and Common Law Torts

Government officials sometimes commit injuries that resemble common law torts, such as physical harm, confinement, malicious prosecution, and defamation. In such cases, the Supreme Court must determine just what interests receive *constitutional* protection, and which are left to the states. Quite naturally, the Court has looked at the common law when deciding just how far constitutional protection extends. Plaintiffs in such cases rely on the rights of "life," "liberty," and "property"[11] protected by the due process clauses of the Fifth and Fourteenth Amendments. The source of these rights was the eighteenth century common law familiar to the framers, and the Court has relied on this common law background to determine their content for purposes of constitutional protection.[12]

In other cases, the existence of a common law remedy may be a reason for denying any further constitutional protection.[13] For example, it was partly because the common law often affords a remedy for defamation that the Court in *Paul v. Davis*[14] ruled out constitutional protection against libel by a public official.[15] In *Ingraham v. Wright*[16] the existence of a state tort remedy was a justification for denying pre-punishment procedural guarantees to students who were paddled for misbehavior.[17] Under *Parratt v. Taylor*,[18] persons harmed by "random and unauthorized" acts by state officials may not bring federal suits as long as the state provides a remedy.[19] Quoting *Paul,* the Court warned that the Constitution should not become "a font of tort law," displacing state tort law.[20]

---

[10] *See, e.g.,* Schweiker v. Chilicky, 487 U.S. 412, 425-27 (1988); Bush v. Lucas, 462 U.S. 367, 378 & n.14 (1983); *see also* Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies,* 65 S. CAL. L. REV. 735, 772-80 (1992) (discussing majoritarian influences on constitutional remedies); Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362, 1366 (1953) (discussing Congressional power over choice of remedies for constitutional violations).

[11] U.S. CONST. amend V. *See* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law,* 72 CHI-KENT L. REV. 617, 633 (1997) (stating that violations of substantive due process guarantees are grounds for constitutional torts).

[12] *See* Ingraham v. Wright, 430 U.S. 651, 673 (1977) (stating that due process protects "those privileges long recognized at common law"); *see also* Wells, *supra* note 11, at 624 (discussing Court's use of common law doctrines to deny constitutional tort claims). Of course, constitutional rights may extend further than the protection of common law. *See, e.g.*, Palmer v. City of Monticello, 31 F.3d 1499, 1504 (10th Cir. 1994).

[13] *See* Wells, *supra* note 11, at 625-26.

[14] 424 U.S. 693, 698-701 (1976). *See* Henry Paul Monaghan, *Of "Liberty" and

Another group of cases borrows concepts from the common law in defining the scope of constitutional rights, usually by distinguishing a narrow constitutional realm from the broader domain of common law protection. In *Daniels v. Williams*,[21] the Court denied constitutional stature to claims based on an official's negligence.[22] In *DeShaney v. Winnebago County Department of Social Services*,[23] the Court found that governments have no affirmative duty to protect persons against private violence, even though the common law may sometimes afford such relief.[24] In *Albright v. Oliver*,[25] the Court rebuffed an effort to constitutionalize the common law tort of

---

"Property," 62 CORNELL L. REV. 405, 423-26 (1977); Wells, *supra* note 11, at 624-26.

[15] For a discussion of the Court's use of tort rhetoric in this case, see Nahmod, *supra* note 8, at 1728.

[16] 430 U.S. 651 (1977).

[17] *Id.* at 682. *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 216 (1984).

[18] 451 U.S. 527 (1981).

[19] *Parratt*, 451 U.S. at 546 (Blackmun, J., concurring). *See* Wells & Eaton, *supra* note 17 at 222-23, 222 n.92.

[20] *Parratt*, 451 U.S. at 544 (quoting *Paul*, 424 U.S. at 701). *See* Heck v. Humphrey, 512 U.S. 477, 489-90 (1994) (stating that incarcerated plaintiff cannot sue under § 1983 without meeting elements of common law tort of malicious prosecution where relief requested would invalidate confinement).

[21] 474 U.S. 327 (1986).

[22] *Daniels*, 474 U.S. at 333. *See also* Collins v. City of Harker Heights, 503 U.S. 115 (1992) (rejecting constitutional tort liability for deliberate indifference to city employee's safety).

[23] DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989). *See* Wells & Eaton, *supra* note 17, at 246-52.

[24] *DeShaney*, 489 U.S. at 203.

[25] Albright v. Oliver, 510 U.S. 266 (1994) (plurality opinion).

malicious prosecution.[26] In *Farmer v. Brennan*,[27] the Court had to decide just what obligation a prison guard has to protect an inmate from attacks by other inmates. The Court framed the issue in terms of state-of-mind, as in torts and criminal law.[28] The Court rejected an "objective" definition of recklessness in favor of a subjective one, identifying the former with common law tort and the latter with criminal law.[29] The 1998 decision in *Sacramento County v. Lewis*[30] required a plaintiff injured in a high-speed police chase to show that the officer's action "shocks the conscience" in order to recover.[31] In this context, even recklessness is not enough.

Whatever else may be said about these cases,[32] the central point that needs to be made is that the Court is on solid ground in refusing to interpret the Constitution as reaching to the full extent of common law rights.[33] There is a big difference between the judicial role in resolving constitutional issues and common law issues. A general principle of American government is that most policy issues should be decided by democratically-elected legislatures. At the same time, the Constitution is the supreme law, and its interpretation is ultimately a matter for judges.[34] When judges make common law rules and interpret statutes, their rulings are always vulnerable to legislative overruling, and their decisions present no threat to the majoritarian premise of the system. By contrast, when the Court makes a constitutional ruling, it overrides Congress and state legislatures. Since the Constitution is the supreme law in our system, legislative judgments must give way to constitutional directives.[35] But respect for majority rule should counsel judges against efforts to aggressively promote policies under the "constitutional" banner.[36] The Constitution should be reserved for truly fundamental rights that legislatures should not be permitted to transgress.[37] The "counter-majoritarian difficulty"[38] appropriately constrains the Supreme Court in cases like *Daniels*, *DeShaney*, *Farmer*, and *Lewis*, where the issue is the substantive content of constitutional rights.

---

[26] *Albright*, 510 U.S. at 271-74.

[27] Farmer v. Brennan, 511 U.S. 825 (1994).

[28] *Farmer*, 511 U.S. at 832-37. For a recent application of this ruling, see Jackson v. Everett, 140 F.3d 1149 (8th Cir. 1998).

[29] *Farmer*, 511 U.S. at 836-38.

[30] 118 S. Ct. 1708 (1998).

[31] *Lewis*, 118 S. Ct. at 1721. *Cf.* Haberthur v. City of Raymore, 119 F.3d 720 (8th Cir. 1997) (holding sexual assault by police officer may be violation of substantive due process).

[32] *See, e.g.,* Thomas Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107 (1991); Wells & Eaton, *supra* note 17; Wells, *supra* note 11.

[33] *See* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 554-55 (1989).

[34] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369-71 (1997).

B. Constitutional Remedies

Though the counter-majoritarian difficulty is a powerful reason for judges to exercise restraint in defining constitutional rights, that objection carries little if any force against judicial law-making on other issues that arise in constitutional tort cases.[39] Causation, damages, immunities, and settlement concern what *remedies* ought to be available for constitutional wrongs. In dealing with these issues, it is a given that the defendant has violated the plaintiff's constitutional rights. Whatever its strength, the preference for majoritarian decision-making has been overcome. For that matter, the counter-majoritarian nature of constitutional rights has a corollary that points in favor of a presumptively liberal approach to constitutional remedies. The reason why legislatures are not permitted to infringe constitutional rights for the sake of goals favored by majorities is that these rights are especially important. In this narrow area, the rights of minorities cannot be overridden, even for the general good. Now the issue is whether the plaintiff can obtain a remedy for the violation. In addition, judicial decisions on remedial matters remain subject to legislative modification.[40] In dealing with these matters, it is appropriate to set aside concerns with judicial interference with majority rule, although there are other policies, such as avoiding the overdeterrence of effective action by government officers that may appropriately limit liability for damages.[41]

---

[35] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

[36] *See* GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 18-19 (13th ed. 1997).

[37] *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-4, at 777-80 (2d ed. 1988); Burnham, *supra* note 33, at 551-52.

[38] *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962).

[39] Professor Nahmod condemns the use of tort rhetoric throughout constitutional tort cases. Nahmod, *supra* note 8, at 1725-31. Whether or not cases like *Paul* are rightly decided, it seems to me to be appropriate to limit the scope of constitutional protection on the ground that some matters are best left to tort law and the majoritarian constraints on tort law. *See* Wells & Eaton, *supra* note 17, at 241.

Any tort case, whether common law or constitutional, raises a host of issues relating to remedies and defenses. Showing that the defendant has breached a duty is never enough, standing alone, for the plaintiff to prevail. He must also prove an injury in order to recover damages, and he must show that the defendant's violation caused the harm. In addition, even if the plaintiff makes out a prima facie case, the defendant may have a defense of some kind.

This section identifies the various ways in which the Supreme Court makes use of the common law in adjudicating the remedial issues that come up in constitutional tort cases. Before proceeding with that project, a potential source of confusion needs to be cleared up. My topic is the use of "common law," not "state law." Since much state law is common law, and most common law is state law, it is easy to confuse the two.[42] For present purposes, however, the distinction is crucial.

---

[40] *See supra* note 10.

[41] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1779-97, 1821 (1991). John Jeffries argues that courts should not go too far in expanding constitutional remedies, for fear that "dilution of rights" would ensue. If there were no immunity doctrine, "[t]he risk is that constitutional rights would be defined with one eye on damages liability." John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 78 (1998). Certainly, remedies can and should be tailored to minimize friction between federal courts and state governments, and thereby accommodate state interests and constitutional liberties. *See* Melvyn R. Durchslag, *Federalism and Constitutional Liberties: Varying the Remedy to Save the Right*, 54 N.Y.U. L. REV. 723, 724 (1979). But the point should not be pushed too far. In my view, courts ought to be careful in deciding how far the Constitution extends. Conversely, if there are good reasons for finding that the Constitution requires something, the resulting vulnerability of officers to lawsuits ought not to count against a constitutional holding. Keep in mind, too, that legislatures retain substantial control over constitutional remedies. *See supra* note 10. If the Court were to get out of hand in its definitions of rights and remedies, Congress would not be defenseless.

On some constitutional tort issues, the Supreme Court does presumptively borrow the law of the state in which the case arises. Typically, these are issues ordinarily governed by statute, but for which there is no applicable federal legislation. Two such areas are time periods on bringing suit and provisions for tort suits surviving the death of the victim. In *Wilson v. Garcia*,[43] the Court ordered federal courts to follow state statutes of limitations in section 1983 cases.[44] In *Robertson v. Wegmann*,[45] the Court directed federal courts to adopt state statutes on survivorship.[46] These cases rely on another civil rights statute from the Reconstruction Era, 42 U.S.C. § 1988, which provides that where federal law is

> deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State[s] . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause.[47]

Although this statute seems to direct federal courts in section

---

[42] For an example of such confusion, see Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997) (stating that "[i]n applying basic tort principles to the facts raised by a particular section 1983 claim, the causation [issue] may be fleshed out with reference to state law tort principles.").

[43] 471 U.S. 261 (1985).

[44] *Wilson*, 471 U.S. at 275.

[45] Robertson v. Wegmann, 436 U.S. 584 (1978).

[46] *Robertson*, 436 U.S. at 594.

[47] 42 U.S.C. § 1988 (1994). *Cf.* Arnold v. Duchesne Co., 26 F.3d 982, 989 (10th Cir. 1994) (refusing to apply two year Utah statute enacted exclusively for use in § 1983 suits).

1983 cases to follow state common law as well as state statutes, the Court does not use it in that way. When the issue relates to such matters as causation, official immunity, or damages, the Court has instead resorted to general principles of common law, rather than telling lower courts to apply the law of the state in which they sit. In what follows, I put aside the question of how far section 1988 should reach, and focus instead on the Court's use of the common law.[48]

1. *Immunities*

Long before the growth of modern constitutional tort law, people injured by government officers tried to sue them for common law torts. Even victims who could prove the elements of a tort often lost because courts generally recognized a defense of "official immunity." This defense was available to an officer who acted in the course of his duties, though its precise terms varied from officer to officer and from one jurisdiction to another.[49] When plaintiffs began to frame their cases in constitutional terms, the immunity issue came up in a new context. The Supreme Court might have ruled that official immunity has no place in constitutional tort, or at most a very small one. The plain language of section 1983 makes no provision for official immunity,[50] and the legislative history indicates that the 42nd Congress intended that the remedy be an especially strong one.[51] But the Court did not choose that alternative, and has consistently recognized official immunity as a shield against liability for constitutional torts.

---

[48] For diverse views on the domain of § 1988, see generally Theodore Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1988*, 128 U. PA. L. REV. 499 (1980); Seth Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985).

[49] *See* Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 758-65 (1987).

[50] *See, e.g.,* Pierson v. Ray, 386 U.S. 547, 558-67 (1967) (Douglas, J., dissenting) (arguing against absolute judicial immunity)

[51] For an argument along these lines, see David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 535-49 (1992).

Many Supreme Court decisions on official immunity borrow heavily from the common law, in order to justify the existence of official immunity and to determine its content. The Court first addressed the immunity issue in *Tenney v. Brandhove*,[52] where the target of a state legislative committee investigation sued for damages, charging that the aim of the investigation was to intimidate him and deter him from exercising his First Amendment rights.[53] Without addressing the merits of the plaintiff's free speech claim, the Supreme Court dismissed the case out of deference to a tradition of legislative freedom from legal accountability that stretched back to the framers of the Constitution, and beyond them to seventeenth century England.[54] Though section 1983 made no provision for immunity, the Court could not "believe that Congress . . . would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language [of the statute]."[55]

The next important immunity case, *Pierson v. Ray*,[56] makes the role of the common law more explicit. Here the issue was whether judges and police officers enjoy official immunity.[57] In holding that they do, the Court invoked the common law.[58] With regard to judges, the Court noted that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for acts committed within their judicial jurisdiction."[59] Again, the broad language of the statute was no obstacle, for "[t]he legislative record gives no indication that Congress meant to abolish wholesale all common-law immunities."[60] While judges are absolutely immune, "[t]he common law has never granted police officers an absolute and unqualified immunity."[61] Instead, they were immune where they acted with "good faith and probable cause,"[62] and the statute should be read against the common law background of its enactment. Police officers' immunity for constitutional torts should be qualified in the same way.[63] In the years since *Pierson*, the Court has relied on the common law in holding that prosecutors,[64] witnesses,[65] and public school officials[66] may assert official immunity, while private actors[67] and municipalities[68] may not.

---

[52] 341 U.S. 367 (1951).

[53] *Tenney*, 341 U.S. at 369-71.

[54] *Id.* at 375-76.

[55] *Id.* at 376. This past term, the Court extended absolute immunity to local legislators, and relied on the common law in doing so. *See* Bogan v. Scott-Harris, 118 S. Ct. 966, 970 (1998) (stating that "[b]ecause the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.")

[56] 386 U.S. 547 (1967).

[57] *Pierson*, 386 U.S. at 548.

[58] *Id.* at 557.

[59] *Id.* at 553-54.

2. Damages

As with official immunity, the text of section 1983 provides no guidance on the rules for determining damages. Once again, the Supreme Court borrows concepts from the common law. The leading compensatory damages case is *Carey v. Piphus*,[69] where the specific issue was the appropriate measure of damages for a violation of the plaintiff's right to procedural due process.[70] The vice-principal had summarily suspended Piphus from school on account of possession of marijuana, giving the student no opportunity to defend himself.[71] Assuming that Piphus's procedural rights were violated, the Court held that he could obtain damages only if he could prove that the violation injured him.[72] "[T]he basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights."[73] For example, if school authorities were in fact justified in suspending Piphus, he could not recover for harm caused by being suspended from school just because he was denied his procedural rights.[74]

---

[60] *Id.* at 554.

[61] *Id.* at 555.

[62] *Id.* at 557.

[63] *Id.* at 551-58.

[64] *E.g.,* Imbler v. Pachtman, 424 U.S. 409, 421 (1976).

[65] Briscoe v. LaHue, 460 U.S. 325, 330-36 (1983).

[66] Wood v. Strickland, 420 U.S. 308, 318 (1975).

[67] *See* Richardson v. McKnight, 117 S. Ct. 2100, 2104 (1997).

[68] *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

[69] 435 U.S. 247 (1978). *See* Jean C. Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CAL. L. REV. 1242 (1979); Note, *Damages Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966 (1980).

[70] *Carey*, 435 U.S. at 248.

[71] *Id.* at 248-49.

What is most important about this ruling for present purposes is that the Court justified its "compensation" principle by reference to the common law. Quoting a torts treatise, the Court declared that "'[t]he cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty.'"[75] Furthermore, in applying this principle to the array of compensation issues that arise in constitutional tort cases, courts should look again to the common law, for "over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights," and "[t]hese rules . . . provide the appropriate starting point for the inquiry under § 1983 as well."[76] Why look to the common law? The Court adopted the interpretive principle familiar to us from the immunity context: "The Members of Congress that enacted § 1983 did not address directly the question of damages, but the principle that damages are designed to compensate persons for injuries caused by the deprivation of rights hardly could have been foreign to the many lawyers in Congress in 1871."[77] Given the silence of the statute on such matters, the appropriate presumption, according to the Court, is that Congress meant to incorporate the common law.

---

[72] *Id.* at 264.

[73] *Id.* at 253-54.

[74] *Cf.* Stevens v. McHan, 3 F.3d 1204, 1207 (8th Cir. 1993) (holding inmate should recover for punishment of administrative segregation imposed without procedural due process).

[75] *Carey*, 435 U.S. at 254-55 (quoting F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956)).

[76] *Id.* at 257-58. Following *Carey*'s lead, lower courts have applied common law principles to other damages issues. *See, e.g.*, Northington v. Marin, 102 F.3d 1564, 1569 (10th Cir. 1996) (stating that in § 1983 actions, persons who concurrently violate others' civil rights are jointly and severally liable for injuries that cannot be apportioned); Larez v. Holcomb, 16 F.3d 1513, 1519 (9th Cir. 1994) (discussing common law rule against allowing jury to take account of city policy of indemnifying its officers for damages awarded against them).

Two major Supreme Court decisions deal with punitive damages. One is *City of Newport v. Fact Concerts, Inc.*,[78] which held that punitive damages are not available against governmental defendants.[79] The Court examined nineteenth century tort law and concluded that "[b]y the time Congress enacted what is now section 1983, the immunity of a municipal corporation from punitive damages at common law was not open to serious question."[80] By contrast, the liability of individual officers for punitive damages was well-established in 1871. In *Smith v. Wade*,[81] even the defendant conceded that punitive damages may be awarded in a proper case.[82] The argument in *Smith* was over the appropriate jury instruction.[83] The Court held that punitive damages are appropriate upon a showing of reckless indifference to the plaintiff's constitutional rights, while the dissent maintained that a malicious intent was required.[84] Both the majority and a dissent engaged in an extensive examination of nineteenth century tort law in their debate over the appropriate instruction.[85]

---

[77] *Carey*, 435 U.S. at 255.

[78] 453 U.S. 247 (1981). *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 843 (1996).

[79] *Fact Concerts*, 453 U.S. at 271.

[80] *Id.* at 259. The Court bolstered its ruling with policy arguments as well. *Id.* at 266-71 (discussing arguments that blameless taxpayers should not be punished for actions of malicious officials, that officials would not be deterred by prospect of punitive awards against municipality, and that punitive awards would be burdensome to municipalities).

[81] 461 U.S. 30 (1983).

[82] *Smith*, 461 U.S. at 35.

[83] *Id.* at 31.

[84] *Id.* at 56-57.

[85] *Id.* at 39-45, 60-65, 68-84 (Rehnquist, J., dissenting).

3. *Release-Dismissal Agreements*

Most civil litigation never gets to trial. Rather than incur the expense of prolonged litigation and run the risk of losing, the parties negotiate a settlement. Settlement is also common in the constitutional tort context, but one particular type of settlement raises special questions. The problem arises when someone has a run-in with the police. The encounter may give rise to two kinds of litigation. On the one hand, the individual may be charged with a crime; on the other, the police may have violated his rights and he may have a good section 1983 suit against the officers. The prosecutor and the tort plaintiff/criminal defendant may make a deal that the criminal charges will be dismissed and the officers will be released from any section 1983 liability. One objection to such an agreement is that the prosecutor, in effect, sacrifices the public interest in prosecuting crimes for the sake of getting some officers off the hook. An even more serious concern is that the threat of criminal prosecution may be used as a bludgeon to protect the officers from tort liability.

In *Town of Newton v. Rumery*,[86] the Supreme Court addressed the validity of such agreements. The first issue addressed was identifying "the source of law that govern[ed] [the] case."[87] The Court did not consider any alternatives. Instead, the Court merely decided to "resolve th[e] question by reference to traditional common-law principles, as [the Court had] resolved other questions about the principles governing section 1983 actions."[88] Here the relevant principle was taken from contract rather than tort law: "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[89]

---

[86] 480 U.S. 386 (1987). *See* Seth Kreimer, *Releases, Redress, and Police Misconduct: Reflections on Agreements to Waive Civil Rights Actions in Exchange for Dismissal of Criminal Charges*, 136 U. PA. L. REV. 851 (1988).

[87] *Rumery*, 480 U.S. at 392.

[88] *Id.*

[89] *Id.* For a recent application of this standard, see Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 527-33 (3d Cir. 1996).

Taking this principle as its starting point, the Court went on to reject a per se rule against such release-dismissal agreements.[90]

4. Causation

In dealing with causation issues that arise in constitutional tort cases, the Supreme Court has used common law concepts, but has not explicitly referred to the common law as the source of its rules. The most important constitutional tort case on causation is *Mt. Healthy City School District Board of Education v. Doyle.*[91] The board of education fired a teacher who had spoken out on issues related to school governance, an activity protected by the First Amendment.[92] The teacher sued for reinstatement, claiming that the board dismissed him in retaliation for his exercise of free speech rights.[93] According to the board, the reason for the dismissal was the teacher's insubordinate (and unprotected) behavior, which included arguing with lunchroom personnel about portion size, insulting students, and arguing with other teachers.[94] The district court found that the protected speech played a "substantial part" in the dismissal, and awarded reinstatement and backpay.[95]

The Supreme Court reversed.[96] The Court pointed out that "a rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of constitutionally protected conduct than he would have occupied had he done nothing."[97] This would accord constitutional rights more weight than they deserve, for "the constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct."[98] The Court replaced the district court's test with one of is own: once the plaintiff demonstrates that the protected conduct was a "substantial" or "motivating factor" in the decision not to rehire, the board should have an opportunity to show that "it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct."[99] While the Court never refers to the common law in articulating this rule, it amounts to a version of the standard "but-for" test of causation that governs most common law tort cases.[100] Recovery is appropriate only where, "but for" the breach of constitutional duty, the injury would not have occurred. Lower courts have adopted the "but for" test for a range of other constitutional tort causation issues.[101]

---

[90] *Rumery*, 480 U.S. at 394.
[91] 429 U.S. 274 (1977).
[92] *Mt. Healthy*, 429 U.S. at 282-84.
[93] *Id.* at 276.
[94] *Id.* at 281-82.
[95] *Id.* at 283.
[96] *Id.* at 287.
[97] *Id.* at 285.

When the issue is not cause-in-fact, but the scope of a defendant's liability for remote consequences of his negligence, the issue is typically treated under the rubric of "proximate cause" in ordinary tort law. Once again, the Supreme Court has borrowed common law principles. In *Martinez v. California*,[102] state parole board members had released a prisoner named Thomas, who, five months later, tortured and killed the plaintiffs' decedent.[103] "But for" causation was not a problem. Absent the prisoner's release, the attack would not have occurred.[104] The plaintiff lost for other reasons that are not made altogether clear in the opinion.[105] At one point, the Court declares that "the action of Thomas five months later cannot be fairly characterized as state action."[106] But the plaintiffs did not seek to characterize Thomas as a state actor.[107] Their theory of recovery was that the parole board acted recklessly in releasing him, and that this recklessness violated the decedent's constitutional rights.[108] A bit later in the opinion, the Court "hold[s] that at least under the particular circumstances of this parole decision, [plaintiffs'] decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[109]

---

[98] *Id.* at 285-86.

[99] *Id.* at 287.

[100] The Court's rule differs from the common law in that, after the plaintiff shows that constitutionally protected conduct is a substantial factor in the decision, the Court puts the burden of proof on the defendant to show that the same decision would have been made anyway. The common law "but for" test puts the burden of proof on the plaintiff, absent special circumstances. *See* Thomas A. Eaton, *Causation in Constitutional Torts*, 67 IOWA L. REV. 443, 452-54 (1982).

[101] *See, e.g.,* Valence v. Wisel, 110 F.3d 1269, 1281 (7th Cir. 1997); Haywood v. Koehler, 78 F.3d 101, 104-05 (2d Cir. 1996); Swint v. City of Wadley, 51 F.3d 988, 999-1000 (11th Cir. 1995); Tatro v. Kervin, 41 F.3d 9, 18 (1st Cir. 1994); Ricketts v. City of Columbia, 36 F.3d 775, 779-82 (8th Cir. 1994); Buckley v. Fitzsimmons, 20 F.3d 789, 797-98 (7th Cir. 1994); Hancock v. Dodson, 958 F.2d 1367, 1374-75 (6th Cir. 1992).

[102] 444 U.S. 277 (1980).

[103] *Martinez*, 444 U.S. at 279-80.

One way of understanding this ruling may be that no one has a constitutional right to be free of the consequences of reckless parole decisions. But this is an unlikely reading, for the Court refused to declare that no plaintiff harmed by a parolee may recover.[110] By characterizing the attack as "too remote a consequence" of the parole decision, the Court apparently relies on a lack of proximate cause.[111] The five month interval, and the fact that "the parole board was not aware that [plaintiffs'] decedent, as distinguished from the public at large, faced any special danger,"[112] meant that the defendants' responsibility for what happened was too attenuated to justify imposing liability, just as common law courts reject liability for remote consequences of a defendant's negligence.[113] Following the lead of *Martinez*, lower courts have adopted common law principles on such matters as superseding cause[114] and unforeseeable consequences.[115]

---

[104] *Id.* at 280.

[105] *Id.* at 285.

[106] *Id.*

[107] *Id.* at 280.

[108] *Id.*

[109] *Id.* at 285.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *See* Eaton, *supra* note 100, at 472-73.

[114] *Compare* Taylor v. Brentwood Union Free Sch. Dist., 143 F.3d 679, 686 (2d Cir. 1998) (holding school principal is not liable for recommending action against

II. DOES SECTION 1983 OBLIGE COURTS TO USE THE COMMON LAW?

The Supreme Court adopts the common law in constitutional tort cases for one of two reasons. Either section 1983 requires resort to the common law, or the Court is free to make its own judgments and chooses this course based on its own evaluation of the merits of the available alternatives. The opinions are equivocal as to which of these rationales explains the Court's behavior, some supporting one and some the other. In this part of the article, I give reasons for rejecting the former, which for convenience I call the "obligation thesis." Part III argues against the latter, which I call the "borrowing thesis."

Burns v. Reed,[116] a prosecutorial immunity case, illustrates the obligation thesis. The Court "look[s] to the common law and other history for guidance because [the Court's] role is 'not to make a freewheeling policy choice,' but rather to discern Congress' likely intent in enacting section 1983."[117] Courts are, of course, required to do as Congress commands them with regard to such matters as causation, defenses, and damages in section 1983 cases. Congress may have directed courts to adopt common law rules specifically to curb judicial law-making. The Supreme Court would step outside its appropriate role if it were to ignore Congress' aims in favor of its own agenda in adjudicating section 1983 cases. This is a basic principle of our system of separation of powers, in which the legislature is the

---

teacher where higher authorities took action based on their independent investigation) *with* Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1071 (2d Cir. 1997) (holding probation department may be liable for recommending unconstitutional sentence actually imposed by judge).

[115] *See* Best v. Essex County, 986 F.2d 54, 56-57 (3d Cir. 1993) (holding attack on prison inmate was unforeseeable consequence of conditions at prison).

[116] 500 U.S. 478 (1991).

[117] *Burns*, 500 U.S. at 493 (citing Malley v. Briggs, 475 U.S. 335, 342 (1986)). *See also* Tower v. Glover, 467 U.S. 914, 922-23 (1984) (stating that Court cannot establish immunities based on judgment that immunities are in interest of public policy).

chief lawmaker, subject only to constitutional constraints.[118] Although section 1983 safeguards constitutional rights, the remedial aspects of section 1983 law are not themselves constitutional rules. For these reasons, there is a strong normative argument in favor of the obligation thesis, provided its factual predicate–the existence of an obligation—can be satisfied.

A. *The Futile Search for an Obligation*

The problem with the obligation thesis is that this factual predicate is altogether absent. The thesis cannot be established by textual analysis,[119] as the text is utterly silent on remedial matters.[120] The Supreme Court often supplements textual analysis of statutes with an inquiry into the legislature's intent.[121] Though the Court sometimes claims to be following the "intent" of the 42nd Congress, as it does in *Burns*, a realistic inquiry into the intent of the framers of the statute would not yield a directive to follow the common law. The legislative history of the Civil Rights Act of 1871 contains many indications that Congress intended to enact a sweeping remedy in order to deal with the serious problem that prompted the statute.[122] That problem was Ku Klux Klan violence against the newly-freed blacks and their white supporters in the South.[123] Witnesses testified that local governments either actively colluded with those breaking the law, or passively allowed the terrorism to continue, as local officials were often powerless to stop the violence even if they tried. The civil remedy provision that became section 1983 was, in fact, the least intrusive part of the statute. Other provisions authorized the President to send in troops and suspend the writ of habeas corpus if necessary.[124] This background suggests that, far from *adopting* the common law, Congress may have meant to *ignore* it in the event it got in the way of the statute's remedial aim. Common law limitations on recovery, such as the immunity doctrines, may actually be at odds with Congress' intent.[125]

---

[118] *See, e.g.,* Tennessee Valley Authority v. Hill, 437 U.S. 153, 194 (1978); *see also* STEVEN J. BURTON, AN INTRODUCTION TO LEGAL REASONING 41-42 (1985); Thomas W. Merrill, *The Common Law Powers of Federal Courts,* 52 U. CHI. L. REV. 1, 19-27 (1985).

[119] WILLIAM ESKRIDGE, DYNAMIC STATUTORY INTERPRETATION 38 (1994).

[120] *See* Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning,* 1990 SUP. CT. REV. 231, 236-37. Some theorists reject the "plain meaning" approach altogether. *See, e.g.,* ESKRIDGE, *supra* note 119, at 38-41.

[121] *See, e.g.,* Commissioner v. Engle, 464 U.S. 206, 214 (1984); ESKRIDGE, *supra* note 119, at 13.

[122] *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study,* 67 CORNELL L. REV. 482, 484-87 (1982).

[123] *Id.* at 484-85.

Before rejecting the obligation thesis, courts must consider another interpretive methodology, one that distinguishes between the specific *intentions* of the framers of a statute and their broader *purposes*. Recognizing the limitations of both textual analysis and adherence to the intent of a statute's framers, the Supreme Court examines the purposes the legislature sought to achieve and asks how those purposes may best be realized in circumstances that the statute's framers may not have contemplated.[126] This more flexible approach to statutory interpretation may be the more appropriate when dealing with a statute like section 1983. Not only is section 1983 open-textured, it dates from the nineteenth century, so that the specific aims of the framers may have little relevance to current needs.

All the same, a search for the legislative purpose cannot yield an obligation on the Court's part to follow the common law. Conditions have changed too much to permit us to identify with any confidence a purpose transported from 1871 to the present, and apply it to current remedial problems. For one thing, the "purpose" of section 1983 may be broad or specific. Writing soon after *Monroe*, Marshall Shapo maintained that in view of the statute's background, its purpose was to provide a remedy only for especially egregious wrongs.[127] This is at least a plausible reading, even though the Court has used section 1983 more liberally than that, extending its coverage to all constitutional and even some statutory violations. The Court seems to endorse the alternative view that by framing the statute in sweeping language, the 42nd Congress indicated a purpose to provide a remedy for the whole panoply of constitutional violations, however extensive the list may become over time.[128] The choice between these two accounts of legislative purpose cannot be made by reference to the statute or its background, for those materials do not speak to the issue and can be read as supporting either. When the Court chooses the broader reading, the decision is a product of modern judicial policy-making.

---

[124] *Id.* at 485. *See also* Michael Wells, *The Past and the Future of Constitutional Torts*, 19 CONN. L. REV. 53, 66-67 (1986).

[125] *See* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 499 (1992).

[126] *See* ESKRIDGE, *supra* note 119, at 25-26.

When the issue at hand does not concern the basic thrust of the statute, but a narrower problem like damages or immunity, on which there is little or no legislative history, the notion that a court can identify and implement the legislative purpose is equally unrealistic, because the answers to such questions turn, in part, on the basic thrust of the new remedy. If the purpose was to deal aggressively with a narrow problem, then it may be appropriate to fashion remedies that achieve that end, ignoring the common law if necessary.[129] But if the purpose was to create a broad constitutional remedy, rather than vigorously pursuing a specific goal, then one may plausibly maintain that a whole array of other considerations–such as the value of official immunity—enter into the choice of remedial rules. In either event, there is no basis in any of the relevant materials for an *obligation* that courts adopt the common law for modern constitutional tort law.

---

[127] Shapo, *supra* note 1, at 327. *See also* Eisenberg, *supra* note 122, at 504-15.

[128] *See* Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part by* Monell v. Department of Soc. Servs., 436 U.S. 658 (1978).

[129] *See* Eisenberg, *supra* note 122, at 485 (stating "although [§ 1983] dealt with a limited problem, its history suggests a firm congressional resolve that the problem feel the full effect of federal power, without regard to traditional limitations").

B. Pragmatic Statutory Interpretation

Some obligations are more clear and direct than others. The lack of support for the obligation thesis in the text and legislative history of the statute casts doubt on, but does not invalidate, the argument for an obligation. In view of the lack of direct support for the obligation thesis, the argument in its favor requires the drawing of an inference. No doubt the reason why the 42nd Congress gave little thought to remedial matters was the preoccupation with debate on other aspects of the statute.[130] Perhaps Congress' purpose, albeit an implicit one arrived at without evident deliberation, was to direct courts to fall back on the common law for rules on immunity, causation, and damages. For the sake of argument, let us assume that this is so.

Still, the case for deference to Congress is weak when the directive is both ancient and implicit. Ignoring Congress' purpose manifests no significant disrespect for legislative judgment in such a case. At the same time, deference is always costly, because it necessarily forecloses the opportunity to pursue other goals. Unsurprisingly, the Supreme Court seems to agree with this evaluation of the pros and cons of deference, by its actions if not its words. Though some of the opinions disavow a judicial policy-making role on section 1983 issues,[131] the Court has overridden the common law when the common law is ill-suited to aims the Justices wish to achieve. In other words, in interpreting section 1983, the Court seems to take a pragmatic attitude, an approach described by Judge Posner as "ask[ing] which of the possible resolutions has the best consequences, all things . . . considered, including the importance . . . of preserving the separation of powers by generally deferring to the legislature's policy choices."[132] From a pragmatic perspective, courts are not under a rigid obligation to obey legislative commands no matter what the circumstances. Instead, the Court uses a balancing approach. Some legislative judgments deserve more respect than others. A clearly and recently expressed legislative preference, bearing directly on the issue before the court, merits the utmost respect. The strength of the argument for deference is far weaker when, as with section 1983, the legislative judgment was made a century ago, against a vastly different legal background, without much thought devoted to the point at hand.

---

[130] *See* Wells, *supra* note 124, at 66.

[131] *See, e.g.*, Burns v. Reed, 500 U.S. 478, 493-94 (1991); Tower v. Glover, 467 U.S. 914, 922-23 (1984).

[132] RICHARD POSNER, OVERCOMING LAW 400 (1995).

Qualified immunity doctrine illustrates the point.[133] Recall that *Pierson v. Ray*[134] instituted such an immunity for the police. It was drawn from nineteenth century tort law, under which the officer prevailed if he acted with "good faith and probable cause." The Court soon applied this regime to other executive officers as well.[135] A feature of the *Pierson* test is that the subjective motivation of the officer is always an issue. Even if the action taken is objectively reasonable, he may lose on the "good faith" prong of the test in the event he acted maliciously, or with the aim of violating constitutional rights. Since the subjective intent of the officer is an issue of fact, few claims could be disposed of without a trial.

In the early 1980s, the Supreme Court grew weary of the disruption of official business that necessarily accompanies extended litigation of this sort. *Harlow v. Fitzgerald*[136] significantly altered the content of the "qualified immunity" rule. In *Harlow*, the Court treated the immunity issue strictly as a matter of policy, asserting that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative."[137] Any immunity blocks the effective enforcement of constitutional guarantees. At the same time, "claims frequently run against the innocent as well as the guilty–at a cost not only to the defendant officials, but to society as a whole."[138] The "social costs" include "the expenses of litigation, the diversion of official energy from pressing public issues, . . . the deterrence of able citizens from acceptance of public office" and an overly cautious attitude on the part of public officials.[139] In the Court's view, the appropriate policy balance required that the "good faith" prong of the official immunity test be dropped in favor of a strictly objective test that awards immunity unless the official violates "clearly established" law, whatever his subjective intent.[140]

---

[133] *See* Beermann, *supra* note 7, at 66-70.

[134] 386 U.S. 547 (1967). *See supra* notes 56-63 and accompanying text.

[135] *See, e.g.,* Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials); O'Connor v. Donaldson, 422 U.S. 563 (1975) (state mental health officials); Wood v. Strickland, 420 U.S. 308 (1975) (school officials); Scheuer v. Rhodes, 416 U.S. 232 (1974) (state governor, national guard, guard officers, university president and other high officials in executive branch of state government).

[136] 457 U.S. 800 (1982).

[137] *Harlow*, 457 U.S. at 813-14. *Harlow* was, in fact, a *Bivens* suit, brought against a federal officer under the federal common law cause of action discussed in note 1, *supra*. Therefore, the "legislative intent" framework of § 1983 litigation

The Court does not even pretend to ground this rule in the common law tradition. In *Anderson v. Creighton*, the Court brazenly denied ever having "suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law," and confessed that *Harlow* "completely reformulated qualified immunity along principles not at all embodied in the common law."[141] *Harlow* teaches that the common law actually has no more force in section 1983 law than the Court thinks is appropriate.[142] It is

---

was not even relevant. Yet the Court made clear that the new policy-based test would be applied to § 1983 suits. *See Harlow*, 457 U.S. at 818 n.30. The Court has routinely done so. *See, e.g.*, Johnson v. Fankell, 117 S. Ct. 1800, 1803 (1997); Burns v. Reed, 500 U.S. 478, 494-95 & n.8 (1991).

[138] *Harlow*, 457 U.S. at 814.

[139] *Id.*

[140] *Id.* at 818. Professor Barbara E. Armacost points out that this "instrumental argument for qualified immunity" is "only part of the story. Another important rationale for qualified immunity, described by the Supreme Court as independent of the instrumental one, is that it would be *unfair* to hold governmental officials to constitutional rules *they could not reasonably have known*." Barbara Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 588-89 (1998). For present purposes, the important point is that, whatever the rationale for immunity, the Court does not merely transplant common law rules into constitutional tort.

[141] 483 U.S. 635, 645 (1987). *See also* Wyatt v. Cole, 504 U.S. 158, 170-71 (1992) (Kennedy, J., concurring); Beermann, *supra* note 7, at 67.

[142] *See also* Monell v. Department of Soc. Servs., 436 U.S. 658, 690-95 (1978) (refusing to apply common law rule of vicarious liability to hold municipal governments liable for constitutional torts of their employees). The Court formally justi-

no answer, of course that the "obligation" upon the Court is to use the common law, but then change it as the Court sees fit. That would be the equivalent of no obligation at all.

C. *The Impossibility of Following the Common Law Without Making Choices*

Suppose that it were possible to establish a legislative intent or purpose to refer to the common law on remedial matters, and that there were no good reasons to depart from Congress' directives. It would still be impossible for the Court to avoid policy judgments. On some issues, the Supreme Court could not simply adopt the "common law rule" even if told to do so, either because of a split of authority as to the appropriate common law rule, because the application of the common law to modern issues is unclear, or because there are at least two

---

fied this ruling within its "legislative intent" framework, relying on Congress' rejection of an amendment that would have made cities liable for the acts of private persons within their borders. The rejected amendment has no direct relevance to the respondeat superior issue, and the Court's reasoning has been criticized. *See, e.g.,* John C. Jeffries, Jr. *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 86 n.24 (1989); Wells, *supra* note 124, at 62-63; Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 938-42 (1979). A more convincing explanation for the outcome is that, as a matter of policy, the Court preferred a regime in which governments were liable only for official policies and customs.

In *Owen v. City of Independence*, the Court rejected any "immunity" defense for municipal defendants. Owen v. City of Independence, 445 U.S. 622, 636-38 (1980). The Court claimed that there was no common law authority for immunity, but its argument is unconvincing because there was a common law tradition of governmental immunity for "governmental" and "discretionary" acts. *Owen*, 445 U.S. at 676-83 (Powell, J., dissenting). Again, the decision probably rests on a judgment that any immunity would interfere too much with the compensatory and deterrent aims of constitutional tort. It is noteworthy that the Court does not stop with historical analysis, but devotes much of the opinion to such a policy analysis. *Id.* at 650-56. *See also* Wells, *supra* note 124, at 63-65.

Also, notice the treatment of injunction issues, where the Court has never limited itself to nineteenth century equity practice. *See, e.g.,* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1288-1304 (1976) (describing rise of public law litigation in late nineteenth and twentieth centuries). It would be odd indeed to suppose that Congress' purpose was to have judges follow 1871 common law, but not 1871 equity practice, without some indication of such a distinction in the statute or its background.

common law analogues that point in different directions. David Achtenberg has shown that divided authority is a problem with regard to official immunity.[143] A further example is provided by *Smith v. Wade*, where the issue was the appropriate jury instruction regarding punitive damages.[144] Specifically, the majority and dissent debated the question whether punitive damages may be awarded only on a finding of malicious intent, or should be available for reckless indifference to the plaintiff's rights. Because "there was significant variation (both terminological and substantive) among American jurisdictions in the latter nineteenth century on the precise standard to be applied in awarding punitive damages,"[145] both sides were able to come up with plenty of cases to support their positions.[146] A better approach would be to set aside the dispute about the precise content of nineteenth century tort law in favor of more attention to the aims the Court should try to achieve with constitutional tort law.

Owen v. City of Independence[147] illustrates the difficulty of applying rules from one era to the problems of another. The issue was whether municipal governments could assert any immunity from liability for damages in section 1983 cases. The Court denied the immunity claim. Examining nineteenth century tort law, the majority granted that municipalities were often immune from suit for their "governmental" activities in some jurisdictions and for their "discretionary" activities in other states.[148] But these immunities were sufficiently different from the "good faith" immunity sought in *Owen* to justify rejecting the city's argument.[149] By contrast, the dissent stressed the fact that, whatever the precise contours of the immunity, nineteenth century common law "recognized substantial tort immunity for municipal actions."[150] The dissent maintained that the reasoning behind the immunity for "discretionary" functions "parallels the theory behind qualified immunity under section 1983."[151] Doubtless, there are colorable arguments on both sides of this question. My point is that the problem cannot be resolved *solely* by reference to nineteenth century tort law. Nor did the Court pretend to. It relied on modern tort policy considerations as well.[152]

---

[143] *See* Achtenberg, *supra* note 125, at 522.
[144] 461 U.S. 30, 33 (1983).
[145] *Smith*, 461 U.S. at 39.
[146] *See supra* notes 81-85 and accompanying text.
[147] 445 U.S. 622 (1980).
[148] *Owen*, 455 U.S. at 644.
[149] *Id.* at 644-50.

In other cases, the problem is that the common law offers more than one analogue.[153] The methodological issue in *Mt. Healthy City School District Board of Education v. Doyle* was how to deal with cases where an official acts with mixed motives, some of them acceptable and others not.[154] The Court adopted a version of the "but for" test that is used to resolve most causation issues in common law torts. But there is another common law analogue that may be even more apt. In the law of defamation, the motive behind making a defamatory statement is a critical issue, as a common law privilege is often available for statements made for a good reason. Rather than the "but for" test, courts use a "dominant purpose" test, under which the jury is told to determine whether the dominant purpose of the communication was to serve some worthy goal or to injure the plaintiff.[155] And there is yet another arguably relevant common law causation rule that applies when two causal agents combine to create a single injury, which either would have caused on its own without the other. Courts will say that each can be held liable if each is a "substantial factor" in producing the harm, even though neither meets the "but for" test. I will return to these alternatives later. For now the point is that where two or more common law rules are available, one cannot simply adopt the "common law" without making a choice. Even if there were an obligation to follow the common law, the Court often could not obey.

---

[150] *Id.* at 676 (Powell, J., dissenting).

[151] *Id.* at 678 (Powell, J., dissenting).

[152] *Id.* at 650-57.

[153] *See* Achtenberg, *supra* note 125, at 523 (stating that "[t]he fact that there is no one common law analog to the cause of action created by § 1983 strongly suggests that Congress did not intend for the Court to incorporate common-law rules.")

[154] 429 U.S. 274, 285-87 (1977).

[155] RESTATEMENT (SECOND) OF TORTS, § 603 cmt. a (1977).

III. BORROWING THE COMMON LAW

A better starting point for interpreting section 1983 is to recognize that the statute's lack of specifics, far from imposing an obligation on the courts to use 1871 common law, amounts to a delegation of authority to the Supreme Court to make appropriate rules for remedial issues like causation, immunities, and damages, taking due account of the background and aims of the statute.[156] Because constitutional tort is an area in which the legislative purpose is obscure with respect to modern constitutional tort issues, "interpretation shades into judicial lawmaking."[157] Professor Eskridge, the leading contemporary authority on statutory interpretation, reports that "federal courts routinely look to the common law, which often serves as a presumptive starting place for interpretation"[158] in filling in the gaps in broadly-worded statutes like section 1983. They borrow the common law "in part because it is convenient, . . . in part because of existing private reliance [on common law rules with which people are familiar], . . . and in part because the common law rules represent public values (they have been the object of judicial trial-and-error and judicial commentary and are, as a result, thought to represent good policy)."[159]

---

[156] *See, e.g.,* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & M. L. REV. 605, 622 n.49 (1981); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1051-54 (1989); Harold S. Lewis, Jr. & Theodore Y. Blumoff, *Reshaping Section 1983's Asymmetry*, 140 U. PA. L. REV. 755, 762-68 (1992); Cass Sunstein, *Interpreting Statutes in the Administrative State*, 103 HARV. L. REV. 407, 421-22 & n.56 (1989).

[157] R. FALLON, ET AL., *supra* note 1, at 755.

[158] Eskridge, *supra* note 156, at 1052.

[159] Eskridge, *supra* note 156, at 1051. Another possible reason is that borrowing serves to further federal-state comity. Where the Court is empowered to make "federal common law" because of some strong national interest in the subject matter of the litigation, it will often borrow state law as the federal rule and rely on federalism as a justification for doing so. *See, e.g.,* United States v. Kimbell

This part of the article sets forth two reasons for rejecting this "borrowing thesis" as a basis for using the common law in section 1983 suits. One argument against the borrowing thesis is that the interests at stake in a constitutional tort suit differ from those in a common law suit, so that rules appropriate for one cannot simply be transplanted into the other. Another reason for rejecting borrowing is that, independent of the interests at stake, the objectives of constitutional tort are different from common law tort; in particular, the deterrence of constitutional violations is an important aim here, and one that is not adequately served by mainstream common law remedies.

A. The Common Law as an Analogue

The argument for assimilating constitutional torts to the common law model is superficially appealing. After all, "[r]easoning by analogy is the most familiar form of legal reasoning."[160] Since common law courts have already examined the policy considerations raised by issues like causation, immunity, and damages, and have settled on answers to them, any judge with an ounce of humility would give careful attention to those answers. But this way of describing the Court's methodol-

---

Foods, Inc., 440 U.S. 715, 728-40 (1979). There are also § 1983 issues where the Court borrows state law, using 42 U.S.C. § 1988 as its authority. One might argue that the borrowing under consideration in this article can be justified in similar terms.

The problem with this rationale is that it confuses two quite distinct kinds of borrowing. Recall the distinction between *state* law and *common* law. *See supra* notes 42-48 and accompanying text. The basic justification for borrowing in the federal common law and § 1988 contexts is that decisions made by state governments should not be overridden without a good reason for doing so. Apart from the state statutes that the Court imports on the authority of § 1988, the kind of borrowing that goes on in § 1983 cases has nothing to do with the pedigree of the rules. When the Court speaks of "the common law" in § 1983 cases, it does not mean the laws of particular states. It means to refer to the general teaching on the common law of torts. Ironically, this is the conception of "the common law" that the Court rejected as a general source of law in *Erie R. Co. v. Tompkins*. Erie R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938). Whatever the merits of this kind of borrowing, it cannot be defended on federalism grounds.

[160] Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 741 (1993).

ogy is ambiguous, in that it blurs the distinction between (a) taking account of the common law, and (b) giving it presumptive effect. In practice, the cases often *do* adopt the common law, suggesting that for the Court, the common law is not just background knowledge any responsible judge would become familiar with, but may carry the day absent a strong argument to the contrary. There is a presumption in its favor, and the presumption carries substantial weight.

Yet the common law ought not to have *any* presumptive force. The problem with reasoning by analogy in this context is that there are important differences between the common law tort and constitutional tort, so that the former is not an appropriate analogue to the latter.[161] Professor Sunstein points out that analogical reasoning operates properly only if "*A* and *B* are 'relevantly' similar, and . . . there are not 'relevant' differences between them."[162] As Professor Sunstein's proviso indicates, negating the argument for using the common law by analogy cannot succeed merely by pointing out dissimilarities. One must take care to establish precisely how and why a given difference is relevant. In particular, the obvious distinction between constitutional tort and common law tort–that they protect different kinds of interests–cuts in different directions depending on the issue at hand. For some purposes, borrowing by analogy is readily defeated by the difference between constitutional rights and the interests in personal security, property, peace of mind, and reputation ordinarily protected by the common law. For example, on the issue of what kinds of harms inflicted by officials amount to constitutional violations, the special institutional concerns that bear on judicial interpretation of the Constitution certainly counsel against constitutionalizing the common law.[163] Conversely, once a constitutional violation is established, the fact that the Constitution protects a fundamentally different interest is enough to squelch the notion that a common law cause of action is adequate to enforce the constitutional right.[164]

---

[161] *See* Nahmod, *supra* note 2, at 11; Sunstein, *supra* note 160, at 745.

[162] Sunstein, *supra* note 160, at 745.

[163] *See* Paul, *supra* note 14, at 701.

Now consider the relevance of the constitutional right/common law right distinction to the validity of the "borrowing thesis" for remedial issues like causation, immunity, and damages. When a common law court addresses these matters, litigants on both sides offer a variety of arguments relating to the pros and cons of the issue at hand. But there is one constant that runs throughout everything a common law court does. It decides any specific issue against a background that pits the defendant's interest in avoiding liability for ordinary personal injury and property damage, against the plaintiff's interest in recovery for these kinds of harm. That ever-present feature of the common law of torts is absent when the plaintiff sues for constitutional tort. Now the plaintiff is *not* merely seeking recovery for harm to person or property. His injury is of a different order. He has suffered a *constitutional* deprivation.

At least in some cases, the constitutional right/common law right distinction ought to make a difference. Common law doctrine on causation, immunity, and damages may be insufficiently accommodating, or even hostile to the plaintiff on account of a perception by common law courts that in the balance of competing interests, the need for protecting officials is more compelling than the interest in compensation for the kinds of injury vindicated by the common law. In that event, "borrowing by analogy" would not be appropriate because the balance of interests is different when the plaintiff asserts a constitutional right. The Supreme Court has recognized this in its development of official immunity doctrine. In *Barr v. Matteo*,[165] a common law defamation case against a high federal official, the Court accorded such officers an absolute immunity from liability for statements made in the line of duty. In the absence of a defense, "the fear of damage suits . . . might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."[166] Some years later, an analogous issue arose in *Scheuer v. Rhodes*,[167] a section 1983 case where students injured by gunfire from Ohio national guardsmen—acting under orders from the Governor, John Rhodes—sought to recover from the Governor. The Court acknowledged the relevance of the policy behind *Barr*, yet rejected the extension of an absolute privilege to the constitutional tort context because "§ 1983 would be drained of meaning"[168] if high state executive officials were absolutely immune. The lesson of the case is that the balance of interests is different in constitutional tort, so that common law defenses may fail where constitutional rights are at stake. The same rationale may be used to justify rejection of the common law as a model for constitutional tort rules on causation and damages.

---

[164] *See* Bivens v. Six Unknown Named Fed. Agents of Bureau of Narcotics, 403 U.S. 388, 394-95 (1971); *id.* at 408-09 (Harlan, J., concurring).

[165] 360 U.S. 564 (1959).

B. *Deterrence and Vindication*

The Court has not only borrowed the rules of the common law of torts, but its normative framework as well. In the common law, the defendant is obliged to compensate the plaintiff in order to vindicate the injured person's rights and to deter wrongful conduct.[169] Section 1983 opinions echo the common law, declaring that constitutional tort ought to serve as a means for vindicating constitutional rights and deterring constitutional wrongs by compensating the victims of constitutional violations.[170] The scope of recovery is defined by these purposes. Thus, the "purpose [of rights] is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect."[171] It follows that "the purpose of an award of damages under section 1983 should be to compensate persons for injuries that are caused by the deprivation of constitutional rights."[172] Similarly, one should avoid "[a] rule of causation . . . [that] could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing."[173] At the same time, imposing liability on officials and governments that commit constitutional violations will deter others from acting similarly, for fear that they, too, will be required to pay.[174] Vindication and deterrence are linked in that the appropriate *amount* of deterrence is determined by the compensatory damages.[175]

---

[166] *Barr*, 360 U.S. at 571.

[167] 416 U.S. 232 (1974).

[168] *Scheuer*, 416 U.S. at 248.

[169] *See, e.g.*, Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (taking issue with tort scholars who champion one goal to exclusion of others). Schwartz "show[s] how the combination of deterrence and justice can provide a better or fuller explanation for [tort] doctrines than can either theory standing on its own." *Id.* Unlike the scholars Schwartz criticizes, courts have generally endorsed one or another "mixed" approach, in which both vindication and deterrence figure prominently. *See, e.g.*, KENNETH ABRAHAM, THE FORMS AND FUNCTION OF TORT LAW 14-19 (1997); W. PAGE KEETON & WILLIAM L. PROSSER, 20-26 (5th ed. 1984).

[170] The Court often uses the term "compensation" to express the purpose of constitutional torts. *See* John C. Jeffries, Jr. *Compensation for Constitutional*

The familiarity of this account of the aims of tort has the unfortunate effect of obscuring an important policy issue. By assimilating constitutional tort to common law tort, the Court has implicitly reaffirmed the link between vindication and deterrence. The Court might have chosen to sever that link and use constitutional damages actions primarily as a weapon for

---

Torts: Reflections on the Significance of Fault, 88 MICH. L. REV. 82, 84 (1989). But in tort theory, "compensation" is a term of art. Serious consideration of compensation would require providing a remedy for any injury due to a constitutional violation. *See* ABRAHAM, *supra* note 169, at 17-19. Such an aim is belied by the tort doctrine, which often denies a remedy, notably on account of immunity. The Court's use of the term "compensation" is best viewed as a colloquial and descriptive way of indicating that the primary aim of constitutional tort is to vindicate the rights of persons unjustly injured by constitutional violations. *See* Jeffries, *supra*, at 84-96.

[171] Carey v. Piphus, 435 U.S. 247, 254 (1978). *See also* Felder v. Casey, 487 U.S. 131, 139-42 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 305-310 (1986); City of Newport v. Fact Concerts, 453 U.S. 247, 267-68 (1981); Owen v. City of Independence, 445 U.S. 622, 650-54 (1980); Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980).

[172] *Carey*, 435 U.S. at 253-54.

[173] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 285 (1977).

[174] *See, e.g., Owen*, 445 U.S. at 650; *Carey*, 435 U.S. at 256.

[175] *See Carey*, 435 U.S. at 256-57.

deterring constitutional violations, without regard to the vindication goal. Instead, the unstated policy behind adopting the normative framework of the common law is a preference for narrowly tailored "private law" remedies over broad "public law" remedies for constitutional violations. The Court has chosen to treat the area as a branch of private law,[176] a domain characterized by litigation with the following characteristics: the lawsuit is (a) "bipolar," focusing on the rights and duties of the parties to the lawsuit between each other; (b) "retrospective" in that it involves "an identified set of completed events;" (c) "right and remedy are interdependent" in that "[t]he scope of the relief is derived more or less logically from the substantive violation under the general theory that the plaintiff will get compensation measured by the harm caused by the defendant's breach of duty;" and (d) the suit is a "self-contained episode," with "the impact of the judgment . . . confined to the parties."[177]

Rather than adopt the private law model, the Court should have conceived of constitutional tort as a "public law" weapon for enforcing the Constitution without regard to such features of private law litigation as the requirement that the remedy serve to vindicate the plaintiff's right.[178] The distinction is borrowed from Professor Abram Chayes, who heralds the advent of "public law litigation." Here, emphasis is placed not merely on identifying and implementing the rights and duties of the parties, but on "the vindication of constitutional . . . policies,"[179] with the lawsuit serving as a vehicle to that goal rather than being an end in itself.

---

[176] *See* Beermann, *supra* note 7, at 72; Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841, 857-58 (1996).

[177] *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976) (contrasting features of "private law" and "public law litigation")

[178] The political premise behind this conception of § 1983 is a "liberal, rights-based approach" which holds that the statute can "be a potentially effective tool of civil rights enforcement." Beermann, *supra* note 7, at 89. Other premises would lead to different notions about reforming § 1983 law. *See* Beermann, *supra* note 7, at 89, 91-94. I used to hold the view that "the Court should rely exclusively on tort principles and policies in developing its [constitutional tort] doctrine." Michael Wells, *The Past and Future of Constitutional Tort*, 19 CONN. L. REV. 53, 55 (1986). Even then, I argued that constitutional values ought to inform the application of tort principles. *Id.* at 69. I now appreciate, more than I did then, the advantages of treating constitutional tort as a deterrent remedy. For an especially persuasive argument in favor of deterrent remedies, see Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988). Though Meltzer's article is not directed at constitutional tort, it greatly influenced my

Professor Chayes points out that the dominant theme in public law litigation is the creative use of injunctive remedies as an alternative to traditional remedies like damages.[180] But the availability of injunctive remedies does not weaken the case for a public law model of constitutional tort. On the contrary, it strengthens it. There are cases in which forward-looking remedies are out of place because the plaintiff is not the target of any continuing or threatened violation, and yet a deterrent remedy is needed because similar injuries will otherwise likely be inflicted on unknown victims in the future. The central principle of public law litigation is that constitutional rights are worth little in the absence of effective remedies for their violation.[181] For that reason, courts faced with remedial issues should always give careful attention to the question of how best to ensure compliance with the Constitution. The answer to that question will vary from one case to another. Sometimes it will be injunctive relief, but on other occasions, a damages remedy will be indispensable.[182]

When the holder of a right is the target of a criminal or civil proceeding, he may enforce the right effectively by raising

---

thinking on the remedial issues in constitutional tort law.

[179] Chayes, *supra* note 177, at 1284.

[180] Chayes, *supra* note 177, at 1292-93.

[181] *See, e.g.,* Meltzer, *supra* note 178, at 282.

[182] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1788 (1991).

For present purposes, set aside the possibility that, as a practical matter, certain kinds of rights cannot be enforced by § 1983 actions. *See* Susan Klein, Miranda *Deconstitutionalized: When the Self-incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 420, 434-54 (1994) (giving reasons to support her assertion that "the confluence of present legal doctrines bars virtually all § 1983 actions based on alleged violations not only of *Miranda* but of the Fifth Amendment itself").

it as a defensive shield. When the violation is threatened or ongoing, the forward-looking relief provided by an injunction or a declaratory judgment will probably be an effective remedy, because the official to whom it is addressed can be fined or jailed for disobedience. But suppose the violation is in the past and is now completed. If there is little chance the injured plaintiff will again be a victim, injunctive and declaratory relief will not be available.[183] This, of course, is the sort of fact pattern that gives rise to virtually all constitutional tort suits. In such a case, a suit for damages is probably the *only* way to enforce constitutional rights.[184] From a public law perspective, the remedial rules bearing on the damages remedy ought to be fashioned so as to maximize the deterrent impact on wayward officers, not merely to determine the rights and duties of the plaintiff and the defendant in the manner of the common law of torts.[185]

Perhaps the Court's rejection of the public law model represents a well-considered value choice against employing constitutional damages as a "deterrent remedy,"[186] although the Court fails to articulate and justify these values in opinions.[187] The conservative majority has often expressed hostility to broad constitutional remedies in other contexts.[188] Yet it is not clear that the Court has adequately thought the matter through. If the opinions are to be taken at face value, the Court's understanding of constitutional torts has been distorted by the common law lens used to view these issues ever since *Monroe*. Were the Court to look at the problem of constitutional tort damages afresh, free of the artificial constraints imposed by common law analogues, the compelling case for a public law model might well become apparent.

---

[183] *See* Los Angeles v. Lyons, 461 U.S. 95, 109, 113 (1983) (holding that because plaintiff made no demonstration that he would again be subjected to alleged constitutional illegality, his remedy was limited to suit for damages); *see also* Eggar v. City of Livingston, 40 F.3d 312, 316-17 (9th Cir. 1994). *Cf.* Chatman v. Slagle, 107 F.3d 380, 382-83 (6th Cir. 1997) (section 1983 suit may be appropriate remedy in circumstances where it would be wrong to apply Fourth Amendment exclusionary rule).

[184] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 409-10 (1971) (Harlan, J., concurring).

[185] *See* Wells, *supra* note 176, at 859.

[186] Meltzer, *supra* note 178, at 281-87. Meltzer only considers the use of injunctive and defensive remedies. *Id.*

[187] The Court's use of history to justify its outcomes on most constitutional tort remedial issues does not seem to me to qualify as an adequate defense of its decisions. *See supra* Part II; *see also* Wells, *supra* note 176, at 854-56; Wells, *supra* note 178, at 60-68.

[188] *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992) (limiting Congress' power to grant standing to persons who have not suffered any "de facto" injury); Allen v. Wright, 468 U.S. 737, 752-61 (1984) (limiting standing to

In the event the Court *has* deliberately repudiated the "deterrent remedy" approach to constitutional tort, the decision to do so may be attacked not only on the merits, but also on process grounds. Since my topic is judicial method, I will stress the latter here. From the perspective of the judicial process, one problem is the Court's failure to face the public law/private law choice in the opinions, an exercise that would have highlighted the problems with borrowing. Even the partisans of the private law model might have had second thoughts. Instead, in holding that the amount of deterrence depends on the compensatory damages, the Court hid behind spurious arguments of legislative intent.[189]

Another process-based objection to the Court's doctrine is internal inconsistency. On causation and damages the Court adheres to the private law model. But on one issue–official immunity–the Court has enthusiastically endorsed a public law approach. The old pre-*Harlow/Anderson* immunity doctrine, with its roots in the common law, reflected the private law focus on the parties to the lawsuit. A defendant escaped liability if he was at fault in not knowing of a constitutional rule or if he acted in bad faith. Pursuing the systemic goal of limiting burdensome lawsuits, the Court, in *Harlow* and *Anderson*, radi-

---

challenge government decisions that have uncertain impact on behavior of private persons); Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 124-25 (1984) (forbidding federal courts to grant injunctive relief on state law grounds against state officers); *see also* Abram Chayes, *Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982).

[189] *See* Carey v. Piphus, 435 U.S. 247, 256-57 (1978) (stating that "[t]here is no evidence that [Congress] meant to establish a deterrent more formidable than that inherent in the award of compensatory damages").

cally altered the rule to remove from consideration the defendant's state of mind. Under the new rule, the officer's "subjective beliefs . . . are irrelevant."[190] The Court appears to have a double standard for departing from the private law model. The Court adopts a public law perspective when doing so will further public values the Court favors, even if most of constitutional tort remains confined within a private law model. The Court's regime does not reflect a principled preference for the private law model. It is merely the product of the current majority's value preferences. It will not withstand scrutiny when the composition of the Court changes and a skeptical new majority probes its weaknesses.

IV. IMPLICATIONS FOR CONSTITUTIONAL TORT DOCTRINE

It is hard to tell whether eliminating the presumption in favor of the common law would have significant consequences for the content of constitutional tort doctrine. A problem with any analysis of judicial method is that the practical value of the inquiry depends on the candor of the judges whose work one is studying.[191] If the reasons stated in the opinions are merely a facade behind which the Court does its work, exposing the facade does not affect the real determinants of decisions, and thus, may have no impact on the outcomes of cases (if only because a determined court can always build a more resistant facade).[192] My premise here is that the Court "means what it says" when giving presumptive effect to the common law, on either the "obligation" or the "borrowing" rationale. If this is so, then undermining the basis for the presumption opens the door to alternatives other than the common law rules the Court has adopted.

---

[190] Anderson v. Creighton, 483 U.S. 635, 641 (1987).

[191] Many academics doubt that the historical analysis in the opinions reflects the real reasons for the Court's rulings. *See, e.g.,* PETER LOW & JOHN JEFFRIES, CIVIL RIGHTS ACTIONS 128-30 (2d ed. 1994); Richard Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987). But other scholars seem to think the Court "means what it says" about how the Court arrives at results. *See, e.g.,* David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Legislative Will*, 86 NW. U. L. REV. 497, 500-35 (1992); Eric H. Zagrans, *"Under Color Of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 526-35 (1985). If the methodology is a facade behind which the "real work" of making law in this area takes place, it is worthwhile to establish that proposition. *See* Wells, *supra* note 178, 57-65. In short, either (a) the Court is sincere, in which case the methodology really matters and ought to be sound; or (b) the Court is not sincere, in which case it deserves criticism for lack of candor; and anyone who wants to think clearly about this area of the law ought to be warned against paying too much attention to the reasoning set forth in the opinions.

This part of the article discusses the effects of replacing the Court's presumption in favor of the common law with a model, like the one I have outlined, that puts the constitutional tort/common law tort distinction at the center of the analysis. At the outset, it is useful to separate the immunity doctrine, on the one hand, from causation and damages on the other. Since the Court has already banished the common law from cases defining the content of official immunity, that aspect of constitutional tort may be impervious to my attack on the Court's common law method. Nonetheless, I believe that my thesis does bear on the immunity doctrine, in that the differences I have identified between constitutional tort and common law tort are relevant not only to the question of whether to use the common law, but also to the *content* of the rules that should replace the common law.

After exploring the implications of the constitutional tort/common law tort distinction in the immunity context, I take up causation and damages, which are the two most important areas where the common law remains influential. In addressing causation and damages issues, however, one cannot sensibly ignore the immunity doctrine and its effects. Keep in mind that a constitutional violation can be established in every single case where immunity, causation, and damages are relevant. Immunity serves the policy of avoiding overdeterrence of beneficial government action, at a cost to the other constitutional tort policies of vindicating rights and deterring violations. The aim of the doctrine ought to be to arrive at a body of rules that achieves *all* of these aims. On account of official immunity, then, the law on causation and damages needs to *systematically* favor the plaintiff, in order to compensate for the systematic under-enforcement of constitutional rights that is the inevitable byproduct of the immunity doctrine.[193]

---

[192] Since keeping the Court "honest" is essential to the integrity of the judicial process, see David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987), showing that the facade is weak is still a useful exercise. Jack Beermann may be more optimistic than I am. He thinks that "once the legal arguments surrounding § 1983 are exposed as indeterminate and politically charged, the reasonable method for the courts is to turn back to the political dialogue that legal argument was designed to replace." Beermann, *supra* note 7, at 53.

This need for a counterweight is one reason for favoring causation and damages rules that broaden the constitutional tort defendant's liability. But the main reasons for a liberal approach are derived from the objections to the "borrowing thesis" discussed in Part III. Each of those objections cut, in one way or another, in the direction of broader constitutional tort liability than the common law model has produced. When a constitutional right is at stake, the balance of interests bearing on remedial rules is more likely to tilt in the plaintiff's favor. This is a general principle that applies in an undifferentiated way across the whole range of remedial problems. In addition, the notion of using constitutional tort as a "deterrent remedy" has implications for the doctrine, in that decoupling deterrence from vindication permits causation rules and damage awards that go beyond the need to vindicate the plaintiff's rights.

A. *Immunity*

One way to deal with the problem of overdeterrence is to disallow any defense, and let governments themselves cope by indemnifying their officers when they are held liable. However extreme this approach may seem to someone familiar with the current regime, one great advantage is that it would align the costs and benefits of avoiding overdeterrence. Because avoiding overdeterrence of bold and effective official action serves the interests of government and society at large, a constitutional tort regime that included no immunity defense would place the costs of avoiding overdeterrence on those who benefit from it.[194] By contrast, the common law official immunity doctrine places the costs of achieving more bold and effective government not on those who benefit, but on the victims of official wrongdoing, and ever since *Tenney*, the Supreme Court has gone along. So far as one can tell from the cases, the Court simply took the common law for granted. None of the opinions seems to recognize that a choice is being made. One effect of erasing the presumptive authority of the common law is to invite a reconsideration and demand a justification of the decision to follow the common law rule on this central point.

---

[193] Immunity is not a barrier in suits against local governments. Owen v. City of Independence, 445 U.S. 622, 657 (1980). But such suits succeed only when the plaintiff can prove that the constitutional violation is caused by the government's policy or custom. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 694 (1978). Since Supreme Court decisions have narrowly defined this category, *see* Jeffries, *supra* note 41, at 58-59, and since state governments may not be sued at all, *see* Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989), few litigants are able to avoid the immunity doctrine by bringing suit against a government. *See* Quern v. Jordan, 440 U.S. 332 (1979).

It is, of course, unlikely that taking away the common law background from the Supreme Court's arsenal of rationales would make a difference in the content of immunity law any time soon. No doubt the current Supreme Court would find no fault with the decision to place the costs of avoiding overdeterrence of good government on the victims of constitutional violations, even without using the common law as a crutch. And the Court may have a strong case on policy grounds. For example, in a recent article, John Jeffries argues powerfully that there are good reasons for keeping the current structure of constitutional tort law, with its requirement that the plaintiff get past the immunity barrier in order to recover for most constitutional torts.[195] Moreover, to the extent my critique of the Court's methodology is an attack on the use of common law rules, I can hardly object to *Harlow* and *Anderson*, where the Court breaks free of the common law model in shaping the law of immunity.[196]

---

[194] *See* Wells, *supra* note 191, at 80-81 & n.151.

[195] *See* Jeffries, *supra* note 41, at 68-81. Jeffries stresses the absence of a strong moral argument for liability without fault, and the ability of a fault standard to provide adequate incentives for obeying the Constitution, but also the danger that strict liability will make officers reluctant to do their jobs and create the risk that broader liability would result in narrower definitions of constitutional rights. *Id.* All the same, the legitimacy and resilience of the Court's doctrine would be better served by stating these reasons in the opinions, where they would be open to scrutiny and debate. Arguing with Professor Jeffries is not quite the same thing, if only because he unfortunately does not speak with the Su-

Granting that immunity will persist in some form whether or not the common law can be used to justify it, questions arise as to the precise content of the defense. Another aspect of my analysis has a bearing on these issues. My thesis is that making constitutional tort law requires two things. First, it is necessary to set aside reliance on the common law and start from scratch. Second, one must take account not only of the need to avoid overdeterrence, but also of the special nature of the plaintiff's interest in constitutional tort and the importance of constitutional tort as a deterrent remedy. In renouncing the common law in immunity cases, the Court has taken one step in the right direction. One must still ask whether the *Harlow/Anderson* doctrine gives adequate weight not only to avoiding overdeterrence but also to the plaintiff-oriented policies as well. Since immunity always gets in the way of deterrence and of vindicating the plaintiff's constitutional rights,[197] there is no way to pursue all of these aims at the same time without making compromises. The challenge is to shape the immunity doctrine to avoid overdeterrence as much as possible, while doing as little harm as possible to the vindication and

---

preme Court's authority.

[196] Note, however, that the Court persists in invoking the common law when the issue is the scope of *absolute* immunity. *See* Bogan v. Scott-Harris, 118 S. Ct. 966, 970 (1998) (local legislators are absolutely immune, in part "[b]ecause the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government"). Since the Court has not offered a justification for using the common law in the absolute immunity context, while abandoning it in the qualified immunity context, it seems inappropriate to distinguish between absolute and qualified immunity in this way. Either the common law should presumptively govern both contexts, or (as I would argue) neither.

[197] *See* Siegert v. Gilley, 500 U.S. 226, 232-33 (1991) (holding court should decide plaintiff states good substantive constitutional claim before addressing immunity issue). As a result, the immunity issue may never get addressed in cases where the plaintiff does not state a good constitutional claim. *See, e.g.,* Barney v. Pulsipher, 143 F.3d 1299, 1309 (10th Cir. 1998); Petta v. Rivera, 143 F.3d 895, 899-900 (5th Cir. 1998).

deterrence goals. An immunity doctrine that is overly supportive of official discretion, so that constitutional rights receive too little protection, may even violate the constitution.[198]

With vindication, deterrence of violations, and avoiding overdeterrence of good government as his principal criteria for evaluating the doctrine, Professor Jeffries defends what he characterizes as the "fault" requirement of current immunity law. Beginning with the vindication goal, he argues that corrective justice "does not *require* strict liability for constitutional torts."[199] In his view, "fault supplies the moral dimension to the fact of causation."[200] An officer who violates the plaintiff's rights, but reasonably believes he is acting properly, is not blameworthy and need not be made to pay as a matter of fairness between the parties. As for deterrence, "the economists teach us that when administration of the negligence standard is completely predictable, negligence will be as effective as strict liability in inducing caution."[201] The need to avoid overdeterrence, of course, points to a fault requirement as well.[202]

The big problem with the argument as a defense of the Court's efforts to accommodate competing interests,[203] is that it is simply not accurate to characterize the current qualified immunity rule as a "fault" requirement. For one thing, *Anderson v. Creighton* drives home the point that the "officer's subjective beliefs . . . are irrelevant."[204] All that matters is whether an officer in his position "could, as a matter of law, reasonably have believed that [the challenged action] was lawful."[205] No matter how blameworthy an officer may be, he escapes liability if this test is met. Granting that a fault rule would provide enough deterrence, *Anderson* falls short because officers who know better will not be adequately deterred by its purely objective test. In terms of fairness, there may be a good reason to excuse the constitutional violator who cannot foresee that his act crosses the line. That officer is not blameworthy because he lacks the knowledge necessary to make a choice in favor of the constitutionally appropriate course of action.[206] But there is no ground at all for letting off the blameworthy officer who acts maliciously, or who has superior knowledge and therefore does foresee the risk.[207]

---

[198] *See* Fallon & Meltzer, *supra* note 182, at 1778-79, 1786-91.

[199] Jeffries, *supra* note 41, at 71. *See also* Jeffries, *supra* note 141, at 99-101.

[200] *See* Jeffries, *supra* note 41, at 71.

[201] Jeffries, *supra* note 41, at 72.

[202] Jeffries also maintains that eliminating the fault requirement would lead to dilution of constitutional rights. *See* Jeffries, *supra* note 41.

[203] It is possible to take issue with the merits of Jeffries's arguments for fault, by maintaining that corrective justice requires liability based on the fact of a constitutional violation. *See, e.g.,* Jeffries, *supra* note 141, at 99 n.61; Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1009 (1990). Or, in the alternative, it could be argued that deterrence will be better served by strict liability, *see* Jeffries, *supra* note 41, at 72-73. However, this sort of policy analysis is beyond the scope of my project in this article. For present purposes, I assume that Jeffries is right about the value of a "fault" requirement.

---

[204] Anderson v. Creighton, 483 U.S. 635, 641 (1987).

[205] *Anderson*, 483 U.S. at 641. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982) (stating that qualified immunity would be defeated if officers knew or reasonably should have known action was unlawful).

[206] *Anderson*, 483 U.S. at 645-46. For the classic statement of the argument for basing tort liability on blameworthiness, see OLIVER WENDELL HOLMES, THE COMMON LAW 76-78 (Mark DeWolfe Howe ed. 1963). Holmes stated, "Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning." *See id.* at 78.

[207] The common law of negligence employs an objective standard, which may lead one to suppose that persons who are capable of better than average conduct are held to the same standard as those who are capable of less. This is not so.

Holmes maintained, and courts have agreed, that the "fault" requisite to liability is not "personal moral shortcoming," Holmes, *supra* note 206, at 85, but failure to meet "a certain average of conduct." *Id.* at 86. Utilitarian considerations cannot be ignored. "[W]hen men live in society, . . . a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare." *Id.* With a few exceptions for persons with pronounced disabilities, well-meaning people who fall below the average must be held liable, despite the absence of personal moral shortcoming. *Id.* at 85-86,

This reasoning produces the objective "reasonable person" standard as a floor beneath which one is liable. But it does not support the use of the reasonable person as a *ceiling*, such that the officer with superior knowledge would escape liability whenever the average person would do so. *Cf.* W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS 185 (5th ed. 1984) (stating that in common law, "if

There is a more subtle problem with the Court's formulation of its doctrine. At times, the Court uses the traditional vocabulary of fault; immunity depends on "the objective reasonableness of an official's conduct."[208] But this is not a typical negligence test, in that the defendant's conduct is not always evaluated by an inquiry into the whole range of circumstances bearing on fault.[209] Rather, many cases state that "objective reasonableness" is "measured by reference to clearly established law."[210] There is danger in dwelling on clearly established law. Lower courts, beginning with this premise, may forget that the ultimate inquiry is the reasonableness of the defendant's conduct, and construct rules for determining what is "clearly established" that may excuse far too much unconstitutional behavior.

Lassiter v. Alabama A&M University is an infamous example of the rhetorical excess this focus on clearly established law can produce.[211] Sitting en banc, the Eleventh Circuit began its discussion of official immunity by quoting *Harlow*'s reference to clearly established law. Judge Edmondson's opinion then proclaimed: "That qualified immunity protects government actors

---

a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it.").

[208] *Harlow*, 457 U.S. at 818. *See also* Hunter v. Bryant, 502 U.S. 224, 227 (1991) (stating immunity turns on objective test of police officer's conduct); Malley v. Briggs, 475 U.S. 335, 341, 343-44 (1986) (holding that malice is not sufficient to defeat immunity if defendant behaved in objectively reasonable manner; objective standard applies when warrant request allegedly caused unconstitutional arrest).

[209] *See, e.g.*, KEETON, *supra* note 207, at 175 (noting reasonableness standard often includes subjective elements).

[210] *Harlow*, 457 U.S. at 818. This emphasis on "clearly established" appears frequently in Supreme Court opinions. *See, e.g.*, Johnson v. Fankell, 117 S. Ct. 1800, 1803 (1997) (stating immunity defense is available to officials when no violation of clearly established law occurred); Elder v. Holloway, 510 U.S. 510, 513, 516 (1994) (citing *Harlow* in holding that whether federal right was clearly established is question of law); Anderson v. Creighton, 483 U.S. 635, 639 (1987) (stating reasonableness of official's conduct is accessed in light of clearly established legal rules); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (stating *Harlow*'s immunity doctrine permits summary judgment when legal rules allegedly violated were not clearly established at that time).

[211] 28 F.3d 1146 (11th Cir. 1994) (en banc).

is the general rule; only in exceptional cases will government actors have no shield against claims made against them."[212] The defendant "is entitled to immunity except in the extraordinary case where [the case law] would lead to the inevitable conclusion"[213] that the act was unlawful. The Court went on to emphasize the availability of immunity unless prior cases clearly forbid the specific conduct complained of in the case at hand.[214] "For qualified immunity to be surrendered, pre-existing law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing violates federal law *in the circumstances*."[215]

Professor Jeffries may well be right that a well-defined negligence standard deters as well as a strict liability standard.[216] Unfortunately, *Lassiter*'s language is at odds with the idea that defendants are liable based on mere negligence.[217] The emphasis on factual specificity and the use of verbs like "dictate" and "compel," and adjectives like "exceptional," "extraordinary," and "inevitable," all combine to leave the impression that only an egregious violation will override immunity. In the years since *Lassiter*, the Eleventh Circuit has repeatedly relied on the case to uphold the immunity defense,[218] and *Lassiter* has found favor in other circuits as well.[219]

---

[212] *Lassiter*, 28 F.3d at 1149. As the court noted, it remains possible to sue for prospective relief, and to obtain damages against local governments. *Id.* at n.2. However, these possibilities scarcely soften the blow of a demanding immunity rule. Prospective relief may be unavailable for other reasons, see *infra* note 244 and accompanying text, and the Supreme Court has made it difficult to recover against governments, see *supra* notes 148, 166-68 and accompanying text.

[213] *Lassiter*, 28 F.3d at 1149 (quoting Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323-24 (11th Cir. 1989) (internal quotation marks omitted)).

[214] *Id.* at 1149-50. Another important aspect of the Eleventh Circuit's approach to immunity is that "the law can be 'clearly established' for qualified immunity purposes only by decisions of the United States Supreme Court, Eleventh Circuit Court of Appeals, or the highest court of the state where the case arose." Jenkins v. Talledega City Bd. of Educ., 115 F.3d 821, 826-27 n.4 (11th Cir. 1997) (en banc). In principle, an officer may ignore the unanimous rule in all other circuits, and in all the district courts in the Eleventh Circuit, and still successfully assert immunity. *But see* Sweaney v. Ada County, 119 F.3d 1385, 1389 (9th Cir. 1997) (citing Blueford v. Prunty, 108 F.3d 251, 255 (9th Cir. 1997)) (observing that "[t]he absence of any authority directly on point is not fatal to a section 1983 claim").

[215] *Lassiter*, 28 F.3d at 1150 (emphasis in original).

[216] *See* Jeffries, *supra* note 41, at 72 (stating completely predictable negligence standard deters governmental misconduct as well as strict liability).

[217] *See supra* notes 212-15.

B. Causation

Whether the plaintiff sues for common law tort or constitutional tort, it is not enough to establish that the defendant breached a duty. It is also necessary to show a causal link between the breach and the injury, and the connection must not be overly attenuated. The general tort law justification for these requirements is that it is unfair to impose liability unless the defendant is responsible for the harm. Where the evidence on causation is ambiguous, or where the defendant's responsibility is debatable, the problem is more difficult. Courts confront a conflict between the defendant's interest in avoiding liability for injuries for which he arguably is *not* responsible, and the plaintiff's interest in obtaining a recovery for injuries for which the defendant arguably *is* responsible. In resolving cause in fact and proximate cause issues courts must make judgments about which of these interests ought to prevail. Drawing on the distinctions I have identified between constitutional tort and common law tort, this section argues against rote borrowing of the common law to resolve causation issues in section 1983 cases.

---

[218] *Lassiter*, 28 F.3d at 1150. *E.g.*, Ensley v. Soper, 142 F.3d 1402, 1406 (11th Cir. 1998); Martin v. Baugh, 141 F.3d 1417, 1420 (11th Cir. 1998); Redd v. City of Enterprise, 140 F.3d 1378, 1382 (11th Cir. 1998); Rowe v. Schreiber, 139 F.3d 1381, 1383-85 (11th Cir. 1998); Flores v. Satz, 137 F.3d 1275, 1277-78 (11th Cir. 1998); Jones v. City of Dothan, 121 F.3d 1456, 1459 (11th Cir. 1997); Foy v. Holston, 94 F.3d 1528, 1532 (11th Cir. 1996).

[219] *E.g.*, Sorenson v. Ferrie, 134 F.3d 325, 330 (5th Cir. 1998); Duda v. Board of Educ., 133 F.3d 1054, 1062 (7th Cir. 1998); Cope v. Heltsley, 128 F.3d 452, 459 (6th Cir. 1997).

1. *Cause-in-Fact*

A common fact pattern in constitutional tort litigation features a present or former government employee complaining that his dismissal, or some other adverse employment action, was done in retaliation for his exercise of constitutional rights.[220] Such a defendant supervisor could have had both legitimate and constitutionally impermissible motives, and the issue is whether there is a sufficient causal connection between the bad motive and the dismissal.[221] In the leading cause-in-fact case addressing this issue, *Mount Healthy City School District Board of Education v. Doyle*,[222] the Court began with the conventional tort law premise that the plaintiff should not recover unless the defendant's unconstitutional action made him worse off, and held that the defendant wins even if the unconstitutional motive was a substantial factor in the firing decision, so long as he can show that he would have fired the plaintiff for good reasons anyway.

The merit of this "but-for" test depends on whether constitutional tort is conceived exclusively as a branch of private law. It makes perfect sense if the focus of the lawsuit is the relation between the plaintiff and the defendant, where the central aim is to correct an injustice done by the defendant to the plaintiff. The wrongdoer, no matter how blameworthy, should be obliged to pay only for the harm he caused. As *Mount Healthy* pointed out, "[t]he constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the [protected] conduct."[223] From a public law perspective, the merits of the rule are more doubtful. The deterrent aim of constitutional torts is subverted by using the but-for test, simply because it often allows an official to act with an unconstitutional motive and still avoid any sanction. Under this test, officers with bad motives will escape liability and its correspondent disincentive to engage in future misconduct, so long as they had other motives as well. In reality, there often are other reasons for firing a malcontent.

---

[220] For a helpful introduction to this area of the law, see MARCY S. EDWARDS, ET AL., FREEDOM OF SPEECH IN THE PUBLIC WORKPLACE (1998).

[221] A similar issue arises in other situations where a government officer is allowed to take an action for some reasons but not for others. For example, prison officials have broad latitude to maintain discipline, but they are forbidden to punish prisoners, or otherwise make them worse off, in retaliation for their exercise of constitutional rights. *See, e.g.*, Hynes v. Squillace, 143 F.3d 653, 657 (2d Cir. 1998); Johnson v. Rodriguez, 110 F.3d 299, 310 (5th Cir. 1997); Hines v. Gomez, 108 F.3d 265, 267-69 (9th Cir. 1997); Burgess v. Moore, 39 F.3d 216, 218 (8th Cir. 1994).

[222] 429 U.S. 274 (1977).

[223] *Mt. Healthy*, 429 U.S. at 285-86. Even then, the better view is that the

Freed of fealty to the common law model and the but-for test, the Court could look for alternatives that better deter constitutional violations. As noted earlier, the common law itself offers other attractive options. In the event two negligently-caused fires, each sufficient to burn down the plaintiff's farm, intersect before reaching the farm, application of the but-for test would allow both of the defendants to escape liability. In response, common law courts have created a special "substantial factor" rule to provide an adequate deterrent and do justice between the parties.[224] Another alternative is the "dominant purpose" test used in defamation cases. The domi-

---

absence of a but-for connection between the illicit motive and the loss of a job goes to damages rather than liability. Suppose a plaintiff can show that protected speech was a substantial factor behind a dismissal that would have occurred anyway, and can also show *other* harm, such as emotional distress, as a result of the defendant's reliance on an impermissible motive. In that event, the plaintiff ought to recover for the emotional distress under the but-for test.

[224] *See* Eaton, *supra* note 99, at 454-55. A somewhat similar common law rule was applied in *Northington v. Marin*, 102 F.3d 1564, 1568 & n.1 (10th Cir. 1996). The plaintiff, a prisoner, was assaulted by other inmates. *Northington*, 102 F.2d at 1567. He sued Marin, a deputy sheriff, asserting that Marin had caused the assault by telling other inmates he was a "snitch." *Id.* Marin introduced evidence that other officers also spread the news about Northington. *Id.* The court applied the common law principle that where two actors both breach their duty to the plaintiff, and the harm was caused by only one of them, but it is unclear which one, the burden of proof shifts to the actors to absolve themselves of liability if they can. *Id.* at 1568. Otherwise, either can be held liable. *Id. See* Summers v. Tice, 199 P.2d 1, 2-3 (Cal. 1948) (holding multiple defendants jointly liable where plaintiff could not prove which defendant shot him); RESTATEMENT (SECOND) OF TORTS § 433B(3) (shifting burden to multiple defendants to prove which one's conduct caused plaintiff's injuries). In accord with the common law principle, the district judge shifted the burden of proof to Marin to show that the inmates who beat Northington heard it elsewhere, and the appellate court approved. *Northington*, 102 F.3d at 1569.

nant purpose test provides that when the speaker acts with both good and bad motives, a privilege is available if the dominant purpose is to serve the legitimate interests of the speaker or the recipient, but not if the dominant purpose is to hurt the plaintiff's reputation.[225] Under a deterrence theory of constitutional torts, the Court would not adopt the but-for test as a matter of course, as it did in *Mt. Healthy*. The Court should ask whether either the "substantial factor" test or the "dominant purpose" test, or some other rule, would better dissuade officers from constitutional violations than the but-for test.[226] By putting forward these alternatives, which are drawn from the common law, I do not mean to suggest that either alternative be borrowed because section 1983 requires them, or because the common law should presumptively be borrowed. They are merely solutions to problems that are similar to the ones faced by constitutional tort courts in mixed motive cases, and should be evaluated on their merits, along with other possibilities.

One feature of cause-in-fact is especially sensitive to the "balance-of-interests" between plaintiff and defendant. Whenever the evidence of causal connection is uncertain, courts must decide just how much leeway to allow the jury. An example, found in many tort casebooks, is *New York Central Railroad v. Grimstad*,[227] where the plaintiff's decedent fell off a barge and drowned.[228] The defendant barge-owner's negligence was in not having a life buoy at hand that could be thrown to the plaintiff before he went under.[229] However, it was unclear whether throwing a buoy would have done any good.[230] Given the burden of proof on the plaintiff to make out the elements of his case, the court found the evidence on causation too speculative to permit the plaintiff to get to the jury.[231] Some years later, *Kirincich v. Standard Dredging Co.*[232] went the other way on similar facts, allowing the plaintiff to get to the jury on causation.[233] The two cases illustrate that what seems at first glance to be a question of fact can actually turn on the court's general stance regarding the balance of interests between plaintiffs and defendants. A court that favors the plaintiff's interest in recovery whenever he makes a plausible showing will be more willing to give the jury leeway than one that favors the defendant's interest in avoiding liability in close cases.[234]

---

[225] *See supra* note 155 and accompanying text.

[226] Keep in mind that the avoiding-overdeterrence policy is implemented by immunity rules, so that any officer who reasonably believes it is appropriate to fire someone for a reason that turns out to be unconstitutional will escape liability for damages.

[227] 264 F. 334 (2d Cir. 1920).

[228] *Grimstad*, 264 F. at 334.

[229] *Id.* at 335.

[230] *Id.*

Uncertainty about cause-in-fact is a common feature of certain constitutional tort fact patterns in which the defendant is not the individual officer who committed the act that directly harmed the plaintiff, but his supervisor or the local government that employs him. In such a case, the government may be sued for inadequate training that exhibits deliberate indifference to the plaintiff's rights,[235] or for an especially ill-considered hiring decision.[236] Similarly, lower courts have held that the plaintiff may sue the officer's supervisor, on the ground that the supervision was so poor as to amount to deliberate indifference to the plaintiff's rights.[237] In either case, the government or supervisor can be held liable only if the inadequate training or supervision is the cause-in-fact of the plaintiff's harm. The problem is that, as with the life buoy cases, the connection will often be uncertain, and as in the common law context, courts differ on the amount of inference-drawing they will allow.[238] No matter how this issue is resolved in common law cases, the plaintiff's stronger interest in recovery for constitutional tort justifies a more permissive approach on the issue of when juries may draw inferences in the plaintiff's favor on causal connection. Of course, there will be cases where it is utterly irrational to do so, and the plaintiff should continue to lose those suits.[239]

---

[231] *Id.*

[232] 112 F.2d 163 (3d Cir. 1940).

[233] *Kirincich*, 112 F.2d at 164. The court found that reasonable men could differ as to whether the defendant could have saved himself if life preservers were present. *Id.*

[234] *See* Wex Malone, *Ruminations on Cause in Fact*, 9 STAN. L. REV. 60, 68-72 (1956).

[235] *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that only when failure to train amounts to deliberate indifference and causes the harm may city be sued).

[236] *See* Bryan County Comm'rs v. Brown, 117 S. Ct. 1382, 1391-92 (1997) (stating that deprivation of third party's federally protected right must be plainly obvious consequence of decision to hire in order to demonstrate liability).

[237] *See, e.g.,* Coleman v. Kaye, 87 F.3d 1491 (3d Cir. 1996) (holding county liable for discriminatory acts of county prosecutor); Searcy v. City of Dayton, 38 F.3d 282, 287-90 (6th Cir. 1994) (dismissing case against police chief for wrongful death caused by another officer for lack of evidence); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576 (1st Cir. 1994) (allowing claim to proceed against police superintendent for actions of police officer); LaMarca v. Turner, 995 F.2d 1526,

2. *Proximate Cause*

Another issue awaiting the Supreme Court's attention is the scope of liability where both the defendant's breach of duty and a causal link between the breach and the plaintiff's harm

---

1539 (11th Cir. 1993) (finding that former prison inmates presented sufficient evidence to establish liability on their damages claim against prison officials); *see also* Kit Kinports, *The Buck Does Not Stop Here: Supervisory Liability in Section 1983 Cases*, 1997 U. ILL. L. REV. 147 (arguing that supervisory officials should be accountable for constitutional violations caused by actions of their subordinates).

[238] *Cf.* Gutierrez-Rodriguez v. Cartegena, 882 F.2d 553, 569 (1st Cir. 1989) (approving jury instruction that favored plaintiff). *Compare* Ricketts v. City of Columbia, 36 F.3d 775, 779-80 (8th Cir. 1994); Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582-83 (1st Cir. 1994); Berry v. City of Detroit, 25 F.3d 1342, 1350-52 (6th Cir. 1994); Buffington v. Baltimore County, 913 F.2d 113, 119-21 (4th Cir. 1990) (giving jury less leeway), *with* Swint v. City of Wadley, 51 F.3d 988, 999 (11th Cir. 1995); Vineyard v. County of Murray, 990 F.2d 1207, 1213 (11th Cir. 1993); Gentile v. Suffolk County, 926 F.2d 142, 152 (2d Cir. 1991); Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990) *and* Bordanaro v. McLeod, 871 F.2d 1151, 1158 (1st Cir. 1989) (giving jury more leeway).

[239] The Supreme Court has apparently singled out the "ill-considered hiring" context for especially "stringent culpability and causation requirements," on the ground that to do otherwise "raises serious federalism concerns, in that it risks constitutionalizing particular hiring requirements that States have themselves elected not to impose." Bryan County Comm'rs v. Brown, 117 S. Ct. 1382, 1394 (1997). *See, e.g.,* Barney v. Pulsipher, 143 F.3d 1299, 1308 (10th Cir. 1998). This is obviously true with regard to culpability. But it seems inappropriate to lump causation and culpability together. Once a constitutional violation is established, the constitutional tort goal of deterring constitutional violations should override "federalism concerns."

have been established, but the consequence of the violation is unforeseeable, or some other actor has intervened after the defendant's violation. Lacking definitive Supreme Court guidance,[240] lower courts have borrowed from the proximate cause doctrine of tort law.[241] In constitutional tort, the intervening cause issue arises when the police violate the plaintiff's rights in arresting him or investigating a crime, and he is then convicted of the crime at a constitutionally impeccable trial.[242] *Johnson v. Greer*[243] illustrates the problem of unforeseeable consequences. The defendant official unconstitutionally kept the plaintiff confined in a psychiatric hospital, where he suffered an injury to his shoulder.[244] Although the but-for test was met, the official was not liable for the shoulder injury because the jury instructions "did not clearly limit the defendant's liability to those harms reasonably to be anticipated from the imprisonment."[245]

---

[240] *See* Martinez v. California, 444 U.S. 277, 285 (1980). *Martinez,* a possible proximate cause case, held that parole officials may not be sued for injuries inflicted by parolee five months after his release. *See supra* notes 102-12 and accompanying text. Some lower courts treat it as a proximate cause case. *E.g.,* Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir. 1997) (considering issue of liability for injury inflicted by someone police wrongly failed to detain); Dorothy J. v. Little Rock Sch. Dist., 7 F.3d 729, 733 (8th Cir. 1993) (holding that assault on plaintiff was too remote consequence of enrolling aggressor in program). The Court's cryptic opinion in *Martinez* offers no guidance as to how proximate cause issues should be handled.

In *Malley v. Briggs,* the Court indicated in dicta that it would follow common law rules on causal intervention. Malley v. Briggs, 475 U.S. 335, 344-45 n.7 (1986). A police officer who obtained a warrant, but lacked probable cause, would not escape liability for the ensuing arrest on the ground that "the judge's decision to issue the warrant breaks the causal chain between the application for the warrant and the improvident arrest." *Malley,* 475 U.S. at 344-45 n.7. The Court explained that "[s]ince the common law recognized the causal link between the submission of a complaint and an ensuing arrest, we read § 1983 as recognizing the same causal link." *Id.*

[241] *See, e.g.,* Warner v. Orange County Dept. of Probation, 95 F.3d 202, 205 (2d Cir. 1996); *see also* Nahmod, *supra* note 2, at 23-25 (illustrating misuse of tort concept of causation in § 1983 context).

[242] *See, e.g.,* Barts v. Joyner, 865 F.2d 1187, 1189 (11th Cir. 1989) (alleging that detention and transportation to sheriff's station was unlawful seizure); Jones v. City of Chicago, 856 F.2d 985, 988 (7th Cir. 1988) (basing claim for false arrest on conspiracy between arresting officers and lab technicians); Hand v. Gary, 838 F.2d 1420, 1422 (5th Cir. 1988) (claiming deputy sheriff was liable for malicious prosecution); McLaughlin v. Alban, 775 F.2d 389, 390 (D. C. Cir. 1985) (alleging broad conspiracy to violate plaintiff's rights in perjury prosecution); Smiddy v. Varney, 665 F.2d 261, 264 (9th Cir. 1981) (claiming § 1983 violation for false arrest); Dellums v. Powell, 566 F.2d 167, 173 (D. C. Cir. 1977) (claiming civil rights violation because arrest was not made on reasonable grounds).

[243] 477 F.2d 101 (5th Cir. 1973).

When defendants seek "proximate cause" limits on liability, the general policy issue is somewhat different from that raised in cause-in-fact cases. Now the defendant's connection to the wrong is established. He claims that liability would violate some *other* principle of fairness. Whether the case is a constitutional tort or a common law tort, the defendant's argument is that it is unfair to hold a party liable where another actor has taken over the responsibility for the situation, or where the injury is outside the bounds of what could have reasonably been foreseen. My thesis is that in deciding where to draw the lines that define the scope of a defendant's liability, courts in constitutional tort ought not to mechanically adopt the common law rules. They should, instead, take account of the broad difference in the interests to be balanced in constitutional tort, giving more weight to the plaintiff's interest in recovery than they do in common law tort. They should also bear in mind the special role of deterrence in constitutional tort.

Both of these special features of constitutional tort point in the direction of weaker proximate cause limits on liability. On the intervening cause issue, for example, I prefer the general approach of *Warner v. Orange County Department of Probation*,[246] over that of *Taylor v. Brentwood Union Free School*

---

[244] *Johnson*, 477 F.2d at 103.

[245] Eaton, *supra* note 99, at 463. *Cf.* Doe v. Wright, 82 F.3d 265, 268 (8th Cir. 1996) (holding relation between police chief's failure to recommend decertification of officer, who later engaged in sexual harassment and sexual assault while employed at another department, was "too remote" to warrant imposing liability on chief); Sheets v. Salt Lake County, 45 F.3d 1383, 1389 (10th Cir. 1995) (stating that officer who unconstitutionally disseminated private information was proximate cause of resulting harm "if the injury is a natural consequence of defendant's actions").

[246] 115 F.3d 1068, 1071 (2d Cir. 1997) (holding probation department may be liable for recommending unconstitutional sentence that was actually imposed by judge).

District,[247] because the former extends the scope of liability for constitutional violations further than the latter.[248] Also problematic is the application of the common law "risk rule" to constitutional torts. Under the risk rule, a defendant is not liable unless the harm is "within the scope of the risks by reason of which the actor is found to be negligent."[249] Arguing by analogy to the common law, it appears that John Jeffries would similarly limit constitutional tort liability, at least so far as the rationale for liability is to compensate the plaintiff for the wrong done to him.[250] In my view, whatever the merit of the risk rule in constitutional tort, the argument by analogy is not sound because there are relevant differences between constitutional tort and common law tort.[251] In addition, whether or not the plaintiff *deserves* compensation for harm that falls outside the interests protected by the constitutional provision at issue, the role of damages as part of the arsenal of constitutional deterrent remedies may justify a departure from the risk rule, as Jeffries acknowledges.[252] As with cause-in-fact, bear in mind that my aim here is not to eliminate proximate cause from the lexicon of constitutional tort, but only to argue for distinguishing constitutional tort from common law tort by putting a thumb on the scales in the plaintiff's favor. There will remain cases where ordinary tort policies control the outcome. Even in a constitutional tort case, the defendant's responsibility may be too attenuated or the consequence too unforeseeable to warrant liability.

---

[247] 143 F.3d 679, 686 (2d Cir. 1998) (holding school principal is not liable for recommending action against teacher, where higher authorities took action based on their independent investigation).

[248] I do not mean that *Taylor* is necessarily wrong on its facts. It may be a sufficient justification for the outcome that the supervisors acted pursuant to their independent investigation.

[249] ROBERT KEETON, LEGAL CAUSE IN THE LAW OF TORTS 10 (1963).

[250] *See* Jeffries, *supra* note 5, at 1463-64, 1466-70.

[251] In addition to the differences I have identified between common law rights and constitutional rights, cf. Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1019-21 (1990). Nahmod argues that "the better analogy for damages purposes is between section 1983 and intentional dignitary torts, [so that] the rationale of the risk rule is inapplicable to section 1983 cases." *Id.* at 1020.

[252] *See* Jeffries, *supra* note 5, at 1475-77, 1483.

C. Damages

A central principle of the common law of torts is that the plaintiff has a right to compensation for the injury inflicted by the defendant's breach of duty. In section 1983 damages cases, the Supreme Court has unswervingly followed the common law.[253] In *Carey v. Piphus,*[254] where the plaintiff was denied procedural due process, the Court adopted the common law "compensation principle,"[255] and indicated that courts should look to common law damages doctrine in implementing it,[256] including the principle that the plaintiff ordinarily may not obtain presumed damages, but recovers only by proving harm caused by the defendant's wrong.[257] *Memphis Community School District Board of Education v. Stachura*[258] reaffirms *Carey* and applies the compensation principle to suits for First Amendment free speech violations, disallowing recovery for the "abstract value" of constitutional rights.[259]

There are two problems with the Court's common law model of damages. First, the interests a plaintiff seeks to vindicate in a constitutional tort suit are different from those at issue in common law tort. Because of these differences, the common law damages rule, which requires that the plaintiff prove harm, fails to implement the compensation principle in constitutional tort. Second, the special role of constitutional tort as a deterrent remedy may produce a radically different approach to damages issues than that of the common law. The compensation principle should not be the sole rationale for a recovery here.

---

[253] I focus on compensatory damages in this article. The court uses the same methodology in punitive damages cases, a topic that I have discussed in detail elsewhere. *See* Michael Wells, *Punitive Damages for Constitutional Torts*, 56 LA. L. REV. 841 (1996).

[254] 435 U.S. 247 (1978).

[255] *Carey*, 435 U.S. at 255.

[256] *Id.* at 257-58. Following the Supreme Court's lead, lower courts have applied tort principles to other damages issues. For example, in *Northington v. Marin*, the Court adopted the common law rule of joint and several liability. Northington v. Marin, 102 F.3d 1564, 1569 (10th Cir. 1996).

[257] *Carey*, 435 U.S. at 259-64.

[258] 477 U.S. 299 (1986).

[259] *Stachura*, 477 U.S. at 306, 310 (internal quotation marks omitted).

1. Proving Damages

Given the interests at stake in most common law tort suits, it is entirely appropriate that the plaintiff recover only for harm that can be proven. Tort law is mainly concerned with providing an effective remedy for severe physical injuries to person and property caused by a defendant's breach of duty. A plaintiff who has suffered such an injury should have no difficulty presenting proof of it. In the absence of such an injury, it is hardly worthwhile for the plaintiff to bring suit, and scarce judicial resources would be better allocated elsewhere. However, it is unwise to apply the general common law rule to constitutional tort. Constitutional tort is unlike common law tort in that physical injuries, while by no means unknown,[260] are not a typical consequence of most constitutional violations. As a result, tangible damages such as lost income and medical expenses are often small.[261] Under the common law, the main intangible injury is "pain and suffering," but this typically requires physical injury or a traumatic experience of a sort that is capable of proof.

---

[260] *See, e.g.,* Mathie v. Fries, 121 F.3d 808, 818 (2d Cir. 1997) (upholding lower court award of damages in § 1983 suit involving sexual assault against prison inmate); *see also* Malloy v. Monahan, 73 F.3d 1012, 1016-17 (10th Cir. 1996) (awarding lost profits).

[261] *See, e.g.,* PETER SCHUCK, SUING GOVERNMENT 116-17 (1983) (stating constitutional rights are no less valuable for being "nonmonetizable"); Theodore Eisenberg & Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641, 687 (1987) (comparing amounts received in constitutional tort litigation with amounts received in other litigation against United States); *id.* at n.192 (finding that, in surveyed cases, median constitutional tort recovery was $11,000). When the victim is a prisoner, the cases suggest that recovery is likely to be small, even for harms that may have generated substantial awards had they occurred in another context. Coleman v. Rahija, 114 F.3d 778, 787 (8th Cir. 1997) (awarding $1000 compensatory damages for defendant's deliberate indifference to plaintiff inmate's serious medical need during childbirth); Briggs v. Marshall, 93 F.3d 355 (7th Cir. 1996) (approving nominal damages for excessive force by police officer); Sockwell v. Phelps, 20 F.3d 187, 192 (5th Cir. 1994) (awarding nominal damages for denying equal protection to inmates by racially segregating cells); Gibeau v. Nellis, 18 F.3d 107, 110-11 (2d Cir. 1994) (granting nominal damages for excessive force against inmate).

Some constitutional torts do produce provable emotional distress. For example, in *Keenan v. City of Philadelphia*,[262] the plaintiff police officers complained about sexual harassment.[263] As a result, they were transferred from the Homicide Division.[264] This was a violation of their First Amendment and Equal Protection rights. They introduced both lay and expert testimony to prove emotional distress, as well as evidence of economic loss, and won substantial damage awards, ranging from $30,000 to $200,000.[265] But *Keenan* is hardly typical. In practice, such cases arise infrequently, if only because plaintiffs who raise retaliatory discharge claims face so many other obstacles that damages is rarely an issue. In other kinds of free speech cases, proof of damages will be a major problem. Consider the plaintiff who is denied a permit for a demonstration, in violation of the First Amendment. He has no medical bills, nor any lost income, nor anything resembling pain and suffering. As opposed to a job-related incident, it is highly unlikely that being turned down for a demonstration permit would produce any credible claim of emotional trauma.[266] Yet the plaintiff lost something of value.[267] The non-monetary damage done by a constitutional violation should not be made to depend wholly on the plaintiff's psychological reaction to it.

---

[262] Keenan v. City of Philadelphia, 983 F.2d 459 (3d Cir. 1992). *See also* Mathie v. Fries, 121 F. 3d 808, 813-15 (2d Cir. 1997) (upholding $250,000 award to prisoner for emotional distress and physical pain); Coleman v. Kaye, 87 F.3d 1491, 1507 (3d Cir. 1996) (upholding $10,000 award for emotional distress caused by equal protection violation).

[263] *Keenan*, 983 F.3d at 467.

[264] *Id.* at 463.

[265] *Id.* at 462.

[266] *Cf.* Williams v. Brimeyer, 116 F. 3d 351, 354 (8th Cir. 1997) (granting inmate who was unconstitutionally denied religious materials $1 nominal damages and $500 punitive damages).

[267] *Cf.* Irish Lesbian and Gay Org. v. Giuliani, 143 F.3d 638, 649-50 (2d Cir. 1998). The Second Circuit insisted that "[t]he denial of a particular opportunity to express one's views can give rise to a compensable injury," but did not square this assertion with *Stachura*'s obligation that harm be proven. *Id.* Instead, the court went on to discuss ways in which free speech violations can "give rise to more tangible harms." *Id.* at 650.

Ironically, there is a common law solution to the problem of damages that are exceedingly hard to prove. As with the cause-in-fact issue in *Mount Healthy*, a Court more sensitive to the differences between constitutional tort and the bulk of common law tort, might have paid more attention to a common law exception to the general rule that the plaintiff must put in evidence of his damages. When plaintiffs suffer injuries that are by their nature hard to prove, the jury is told that it may presume damage and award a suitable amount, even without proof of harm. For example, the tort of defamation provides for a recovery for lost opportunities for relationships with others due to the defendant's dissemination of false statements that reflect badly on the plaintiff. Common law courts have long held that damages can be presumed from a written publication that is defamatory on its face. The reasoning is that it is difficult or impossible to tell who may read the libel and be deterred from dealing with the plaintiff. The goal of making the plaintiff whole would be defeated if he were required to offer proof of a lost relation.[268] Presumed damages are also available for torts aimed at protecting the plaintiff's dignity, such as offensive battery, assault, malicious prosecution, and invasion of privacy.[269]

Perhaps the Supreme Court could be persuaded to adopt presumed damages for constitutional violations.[270] There is authority for doing so in voting rights cases decided years ago.[271] So far, however, the Court has resisted the notion that constitutional rights have intrinsic value to the plaintiff, independent of harms, like emotional distress, wrongful suspension from school, lost salary or medical expenses, which are all subject to proof. In *Carey*, the plaintiff cited defamation law in support of his effort to recover presumed damages for the violation of procedural due process, even if the suspension from school were in fact justified.[272] But the Court rejected the plaintiff's suggested analogy to defamation, noting that, "in contrast to the immediately distressing effect of defamation *per se*, a person may not even know that procedures *were* deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation."[273] In procedural due process cases, there is also an "ambiguity in causation, which is absent in the case of defamation *per se*," in that "whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure."[274] And unlike defamation, there is no special problem proving emotional distress. "Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff."[275] It is too soon to say whether this hostility to presumed damages will be extended beyond procedural due process. Although the *Stachura* Court did not flatly reject presumed damages for free speech violations, neither did it endorse them. The Court cited the compensation principle in disapproving of an instruction that would have allowed recovery for the "value" of First Amendment rights.[276]

---

[268] *See* Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 760-61 (1985).

[269] *See* DAN DOBBS, LAW OF REMEDIES § 7.3 at 635 (2d ed. 1993).

[270] *See* Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 WASH. & LEE REV. 67 (1992).

[271] *See* Nixon v. Herndon 273 U.S. 536, 541 (1927); Myers v. Anderson, 238 U.S. 368 (1915); *see also* Love, *supra* note 270, at 80-84.

2. *Deterrence and Damages*

Even if the "vindication by compensation" goal were fully met by the provable damages rule, the deterrence aim of constitutional tort is ill-served by the compensation principle. In

---

[272] Carey v. Piphus, 435 U.S. 247, 263 (1978).

[273] *Carey*, 435 U.S. at 263 (emphasis added).

[274] *Id.*

[275] *Id.* at 263-64.

[276] Memphis Community Bd. of Educ. v. Stachura, 477 U.S. 299, 308-12 (1986). Some lower courts after *Stachura* have awarded presumed damages for free speech violations. *See, e.g.,* Walje v. City of Winchester, 827 F.2d 10, 12-13 (6th Cir. 1987); City of Watseka v. Illinois Pub. Action Council, 796 F.2d 1547, 1559 (7th Cir. 1986).

Carey[277] and *Stachura*,[278] the Court recognized that the aims of tort damages include both vindication of rights and deterrence of violations. In the Court's view, deterrence requires no departure from the compensation principle of the common law because the appropriate amount of deterrence is determined by the compensatory damages. For the typical common law tort, it is wholly appropriate to link compensatory damages and deterrence in this way. Since the total cost of the accident is measured by the cost to its victims, there is no divergence between the actual cost and the amount the victims recover. And since any given injury is often severe, the victim will usually have a sufficient incentive to sue.

By contrast, the deterrent effect of traditional compensatory damages for constitutional torts is often weak. Because provable damages for constitutional violations are comparatively small, many victims may not find it worth the trouble to bring suit in the first place. Yet the total amount of harm–if it could be aggregated–can be significant. There may also be a gap between the injury felt by the plaintiff and the total harm to society caused by a constitutional violation. The social cost of some constitutional violations is established by the nature and purposes of the right itself. A central aim of free speech is to guarantee the vigorous debate that is needed for self-government,[279] just as the right to vote is integral to the democratic process.[280] *Stachura* is troubling because the Court failed to appreciate that the injury caused by a denial of free speech affects the whole community. When people forego speech on account of intimidation, we all lose the benefit of the free flow of information and vigorous debate on public issues. The harm to society is not captured by a judgment that reflects the plaintiff's injury, even if the provable damages rule adequately measures the plaintiff's harm. Quite apart from the specific systemic benefits of rights like free speech and the right to vote, "[s]ubjecting an interest to constitutional protection is sometimes a way of saying that it ought to be treated as if it were priceless–that we do not wish to allow government to take it . . . at *any* price."[281] To the extent this is so, all of society has an interest in deterring constitutional violations, no matter how minor the harm suffered by any particular individual.

---

[277] *Stachura*, 477 U.S. at 307.

[278] *Carey*, 435 U.S. at 256-57.

[279] *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964); *see also* Harry Kalven, *The* New York Times *Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 208-09 (discussing "central meaning of First Amendment"); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 304-06 (1992) (advocating First Amendment protection of political speech).

[280] *See, e.g.*, Kramer v. Free Union Sch. Dist., 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST 101-03 (1980).

Current law addresses the need for a deterrent remedy through the Civil Rights Attorneys' Fees Award Act of 1976,[282] under which a successful plaintiff ordinarily obtains attorney's fees in addition to compensatory damages from the defendant.[283] It is doubtful whether this statute is an adequate response to the problem. A decade ago, an empirical study found evidence that "attorney fees play a lesser role in civil rights litigation than one might expect."[284] Recent Supreme Court decisions construing the statute are no help, as they impose too many limitations on attorney's fees to provide sufficient encouragement to bring constitutional tort suits. The fee is based primarily on the number of hours worked multiplied by a reasonable hourly rate. There is no "multiplier" for winning an especially risky case.[285] *Farrar v. Hobby*[286] holds that a plaintiff who seeks substantial damages and "prevails" on the substantive merits, but cannot prove damages, may be entitled to no attorney's fee at all.[287] Worse, the logic of *Farrar,* which stresses the plaintiff's relative lack of success as the rationale for the refusal to award fees,[288] suggests that the Court may institute a general rule that the fee must be proportionate to the award, so that a small award would justify only a small fee.[289]

---

[281] Schuck, *supra* note 261, at 116.

[282] 42 U.S.C. § 1988(b). On the incentive effect of the statute, see Stewart J. Schwab & Theodore Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 745 (1988).

[283] *See* Low & Jeffries, *supra* note 191, at 268-69, 570-72; *see also* SHELDON NAHMOD, ET AL., CONSTITUTIONAL TORTS 391-431 (1995).

[284] Schwab & Eisenberg, *supra* note 282, at 755.

[285] *See* Burlington v. Dague, 505 U.S. 557, 564-67 (1992).

[286] 506 U.S. 103 (1992).

[287] *Farrar*, 506 U.S. at 115. *See* NAHMOD, *supra* note 283, at 400.

In some cases, an award of punitive damages can remedy the shortcomings of the common law compensatory damages doctrine.[290] This is not a satisfactory response to the problem. Traditional punitive damages principles, adopted by the Supreme Court in *Smith v. Wade*,[291] authorize such an award only where the defendant's conduct is egregious, and compensatory damages are inadequate across the whole range of constitutional torts. One solution is to allow the liberal use of punitive damages whenever the provable compensatory damages fail to deter adequately.[292] While this is better than doing nothing,[293] it would ignore the historic function of punitive damages as a sanction against especially outrageous conduct. Apart from the wisdom of avoiding doctrinal developments that disrupt settled understandings of legal concepts, the risk is that twisting punitive damages out of shape will confuse the jury and distract it from the real problem at hand. A better approach would be for the Court to extract itself from the common law model that divides the damages into these two categories. Instead, the Court should use its power to make federal common law to invent a new category of “extra-compensatory” but avowedly non-punitive damages, and instruct the jury that such damages may be awarded if the jury decides that society’s interest in deterring a given constitutional violation requires a bigger payment from the defendant than the compensatory award the plaintiff would ordinarily receive.

---

[288] *Farrar*, 506 U.S. at 114 (stating "'the most critical factor' in determining reasonableness of fee award 'is the degree of success obtained.'") (quoting Hensley v. Eckerhart, 461 U.S. 424, 436 (1983)).

[289] *Contra* Washington v. Philadelphia County Ct. of C.P., 89 F.3d 1031, 1039-41 (3d Cir. 1996) (rejecting such an argument); id. at 1045-50 (Aldisert, J. dissenting) (advocating deference to district judges on issue of whether attorney exercised proper billing judgment).

[290] *See, e.g.,* Cooper v. Casey, 97 F.3d 914, 919-20 (7th Cir. 1996) (finding that mechanical ratio of compensatory and punitive damages "would not make good sense"); Harris v. Chapman, 97 F.3d 499, 506 (11th Cir. 1996); Caban-Wheeler v. Elsea, 71 F.3d 837, 840-42 (11th Cir. 1996).

[291] 461 U.S. 30 (1983).

[292] *Cf.* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873-75, 887-900 (1998) (arguing that in tort law generally, adequate deterrence requires imposition of punitive damages where, for one reason or another, defendants do not bear full costs of accidents through liability for compensatory damages).

[293] *See* Wells, *supra* note 253. The focus of this article was the use of punitive damages in section 1983 litigation. The article did not address the issue of whether the use of punitive damages was the *best* way to deter constitutional violations.

V. CONCLUSION

This article has criticized the Supreme Court’s section 1983 doctrine on damages, causation, and immunity. By offering historical arguments to justify the use of common law rules in damages cases, the Court has avoided the need to address many of the constitutional tort policy issues these cases raise. When history fails to produce suitable outcomes, as in the immunity area, the Court has abandoned history in favor of policy. Sometimes, as in the causation cases, the Court uses tort concepts without setting forth any rationale, as though no choice is being made. The resulting doctrine is a mish-mash of history, constitutional tort policy, and modern common law tort doctrine, lacking any unifying principles. There is, however, a more charitable way to view the Court’s work in constitutional torts. Keep in mind that the area barely existed forty years ago. The Court has had to face a great number of thorny remedial issues over a comparatively short period of time, against a constantly shifting constitutional background. In these circumstances, it is hardly surprising that the opinions strive for legitimacy by reference to history, and venture into policy analysis as little as possible.

It is time for the Court to move beyond coping with one problem at a time, and undertake to develop a theory of constitutional torts. I have argued that the Court ought to begin by recognizing that constitutional torts and common law torts are fundamentally different from one another in two ways. First, the interest at stake on the plaintiff’s side of a constitutional tort case is systematically stronger than the plaintiff’s interest in common law torts. Second, constitutional tort suits serve a function in the law of constitutional remedies–supplementing defensive and prospective remedies—that is quite independent of the plaintiff's interest in recovery. Because of these differences, the Court ought to strip the common law of its presumptive validity. Doing so would produce rules that systematically favor the plaintiffs on a variety of causation and damages issues. Granting the legitimacy of an immunity defense based on the policy of avoiding overdeterrence, the Court should not view immunity in isolation, but should strive to accommodate the "avoiding overdeterrence" goal with the goals of vindicating constitutional rights and deterring constitutional violations. A consequence of the shift in emphasis would be an immunity doctrine that pays more attention to fault than does the current focus on whether the officer has violated clearly established law.

METHOD IN INTERPRETATION: PRACTICAL WISDOM AND THE SEARCH FOR MEANING IN PUBLIC LEGAL TEXTS

Rev. Robert John Araujo, S.J.[*]

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."[1]

> Someone says to me: "Show the children a game." I teach them gaming with dice and the other says "I didn't mean that sort of game." Must the exclusion of the game with dice have come before his mind when he gave me the order?[2]

I. INTRODUCTION

It would seem that the American legal scene has produced a sufficient quantity of legal scholarship and commentary over the last two decades to raise the question: Hasn't there been enough written on theories of interpretation to give the subject matter a rest? After reviewing the corpus of literature produced since the early 1980's,[3] one might be inclined to agree with this sentiment—particularly after reflecting on the interpretative approach offered by Lewis Carroll's Humpty Dumpty. Yet, as the second quotation from Lon Fuller points out, those of us who labor in the world of understanding the law and explaining its meaning to others (whether they are clients or someone else), should take seriously the role of legal interpreter.[4] Since 1958 when Henry Hart and Albert Sacks published their tentative edition of *The Legal Process* and lamented that there seemed to be no "accurate statement" of how courts—and, for that matter, lawyers—interpret,[5] we have become awash in theories and meta-theories. But on closer scrutiny, we[6] see that many of these writers who have offered theories of interpretation (whether they be academics, judges, or practitioners) have advocated or preferred one particular theory of interpretation over others. The spectrum of theories (and, consequently my critique) ranges from plain meaning,[7] originalist,[8] textualist,[9] intentionalist,[10] purposivist,[11] contextualist or dy-

---

[*] Professor of Law, Gonzaga University. The author extends his thanks to Dean John Clute for his support and that of the Alumni Fund of Gonzaga University School of Law. Gratitude is also due John Attanasio, former dean of Saint Louis University School of Law, and Professor Josef Rohlik for their support while the author was a visiting professor at Saint Louis University Law School. The author is most grateful to his former research assistant David Lessoff, Esquire, whose insights and diligent work greatly facilitated the author's task. Finally, the author expresses his thanks and affection to Professor Frank Grad of Columbia University School of Law whose encouragement has never faltered.

[1] LEWIS CARROLL, *Through the Looking Glass, in* THE COMPLETE WORKS OF LEWIS CARROLL 196 (1939), quoted in TVA v. Hill, 437 U.S. 153, 173, n.18 (1978).

[2] Lon L. Fuller, *Human Purpose and Natural Law*, 53 J. PHIL. 697, 700 (1956).

---

[3] In the next several footnotes, I refer the reader to a wide variety of authors who investigate as critics or as supporters these various approaches to interpretation. My lists, while comprehensive, are by no means complete. For a critique of "fancy theories" of interpretation, see Larry Alexander, *Fancy Theories of Interpretation Aren't*, 73 WASH. U. L.Q. 1081 (1995). *See also* Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values,* 21 SETON HALL LEGIS. J. 233 (1997) where the author offers a detailed overview of contemporary methods of statutory interpretation and suggests that "legal system values" [i.e., "that law be predictable in individual cases, replicable in similar cases, vertically coherent across time, horizontally coherent across related areas of law, responsive to society's needs and values, responsive to changes in society's needs and values, influential in shaping social values or morals, and fair and just in individual cases"] should influence the debate on and development of interpretive methods. *Id.* at 236-237

[4] Within an American publishing context, Francis Lieber's mid-nineteenth century monumental work entitled LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES, reprinted in 16 CARDOZO L. REV. 1883 (1995) has acted as a catalyst for both academic and practical inquiry into the meaning of legal texts. Lieber's investigation of legal interpretation is both broad and profound. I have resisted the temptation of focusing on his contributions to legal interpretation—and their problems—in this essay. However, others in a symposium fashion have provided a important commentary on the contributions and limitations of Lieber's undertaking. *See* Symposium, *Legal and Political Hermeneutics*, 16 CARDOZO L. REV. 1872 (1995).

[5] Hart and Sacks state in the context of statutory interpretation:

> Do not expect anybody's theory of statutory interpretation, whether it is your own or somebody else's, to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.

HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

[6] Throughout this essay, I frequently use the first-person plural, not out of inflated self-esteem, but rather, to express that as Americans—be we citizens, legislators, judges, lawyers, or public officials—we are to one extent or another participants in the work of interpreting law. *See* Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 399, n.1 (1985) for an explanation of his use of the term "we."

[7] *See, e.g.*, Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991); Michael S. Moore, *Plain Meaning and Linguistics—A Case Study*, 73 WASH. U. L.Q. 1253 (1995); Arthur W. Murphy, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057 (1995); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND L. REV. 715 (1992); David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565 (1997).

[8] *See, e.g.*, LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001 (1991); Raoul Berger, *An Anatomy of False Analysis: Original Intent*, 1994 BYU L. REV. 715; Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9 (1995); Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (stating Powell's conclusion that it was not Framers' expectation that Constitution would be interpreted in accordance with Framers' intent); Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493 (1996); Jack N. Rackove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159 (1996); Ronald D. Rotunda, *Original Intent, The View of the Framers, and The Role of the Ratifiers*, 41 VAND. L. REV. 507 (1988); Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 HASTINGS CONST. L.Q. 599 (1997); Michael L. Wells & Edward J. Larson, *Original Intent and Article III*, 70 TUL. L. REV. 75 (1995). *See also The Symposium: Originalism, Democracy, and the Constitution*, 19 HARV. J.L. PUB. POL'Y 237 (1996) which contains a wide spectrum of views regarding the place, if any, of originalist methodology in Constitutional interpretation.

[9] *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); William N.

namist.[12]

At the outset, I suggest two things about these theories of legal interpretation.[13] First, each has something of value to offer to the interpreter who tackles a public legal text in order to ascertain its meaning.[14] Second, each of these approaches tends to exclude important, even vital, aspects of the interpre-

---

Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990); John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes*, 32 WM. & MARY L. REV. 827 (1991); Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 1997 WIS. L. REV. 235; George H. Taylor, *Textualism at Work*, 44 DEPAUL L. REV. 259 (1995); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683 (1985).

[10] *See supra* note 8; *see also* Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630 (1992).

[11] *See, e.g.*, HART & SACKS, *supra* note 5, at 169; Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267 (1988); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950); Stephen F. Williams, *Rule and Purpose in Legal Interpretation*, 61 U. COLO. L. REV. 809 (1990).

[12] *See, e.g.*, Anthony D'Amato, *The Injustice of Dynamic Statutory Interpretation*, 64 U. CIN. L. REV. 911, 912 (1996) (critiquing such theories with fundamental contention that "a judge is not a legislator."). *See also* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

[13] For an interesting examination of theories of legal interpretation and the preservation and enhancement of democratic institutions, see Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593 (1995). Professor Schacter's investigation promises to take the reader across "conventional ideological lines." *Id.* at 595.

[14] This essay explores in Part III the application of Bernard Lonergan's METHOD IN THEOLOGY to legal interpretation. *See* BERNARD LONERGAN, METHOD IN THEOLOGY, (1971). Lonergan offered a preliminary understanding of the term "meaning" as that which "is embodied or carried in human intersubjectivity, in art, in symbols, in language, and in the lives and deeds of persons." *Id.* at 57. The functions of meaning are: (1) "cognitive"—meaning as a cognitive function places the individual in "a world mediated by meaning" *Id.* at 76; (2) "efficient"—human work is not a mindless function, it "makes" after the maker "intends" to do or achieve something *Id.* at 77-78; (3) "constitutive"—an intrinsic component of human culture and institutions are their intersubjective meaning *Id.* at 78; and, (4) "communicative"—what something means to one individual is passed on to others intersubjectively. *Id.*

tive enterprise so that something essential to the discernment of the text's meaning is lost; consequently, they are generally limited in the degree of meaning that each can contribute with regard to a specific legal text. In the coming pages, I intend to demonstrate both the contributions and the limitations.[15] However, the purpose of this essay is not to criticize but to construct. It is my primary goal to provide a framework which will offer the interpreter of public legal texts—a method—to interpret the most difficult of such legal texts.[16] By public legal texts, I mean those normative texts—primarily constitutions, statutes, and regulations—that address order and structure in the intersection of our lives as we come together in political, social, economic and other public communities.[17] In essence, the common denominator shared by these texts is the regulation of individual and corporate human existence for the promotion of the common good. These legal texts, moreover, are a form of official communication in which authoritative bodies establish the existence and awareness of how we should live together. As the law, these texts offer guidance and directives, define obligations and entitlements, and provide structures for resolution of conflicts between individuals and institutions.[18]

---

[15] For an innovative approach to interpreting public legal texts by developing a "method of interpretation whose theory embodies the practical roles played by various actors and whose aspiration is a holistic understanding of interpretation as an interactive function not simply among a narrow cadres of judges and lawyers, but broader social groupings that include those laypersons whom the law purports to regulate. . ." see Maxwell O. Chibundu, *Structure and Structuralism in the Interpretation of Statutes*, 62 U. CIN. L. REV. 1439, 1443 (1994).

[16] *See* Lonergan, *supra* note 14, at 14 where Lonergan defines the term method as, "a normative pattern of recurrent and related operations yielding cumulative and progressive results."

[17] See Schauer, *supra* note 6, at 425-26, for another discussion about norms being "embodied in language" which has the power to instruct or "pull" the members of society. *See also* Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603, 609-10 (1985) (suggesting that "text is legally normative if it is regarded as a source of legally controlling norms. Justification is the process of giving reasons (or the substantive reasons given) to support moral and legal claims or arguments. Interpretation is the process by which people find meaning in or attribute it to anything, including texts (or the meaning found or attributed)").

[18] As we contemplate the scope of the meaning of the law encountered in our

They are grammatically and syntactically arranged words. Each text has its own inherent meaning that has evolved with every day use. Ordinarily, they have been purposefully put together to assist and instruct the members of the community in understanding with greater determinacy both individual and communal recognition of our obligations and entitlements.[19]

Why a "method" rather than a "theory"? I write as a practitioner, teacher, pragmatic theorist, and citizen. In one sense, I do develop a theory insofar as I attempt to construct a scheme or system of concepts based on observation and experiment. My suggestion offers a process for developing better meanings of public law texts such as statutes and constitutions when their meaning is disputed by rational lawyers, judges, legislators, administrators, and citizens.[20] The search for meaning is an important, even vital, enterprise in our existence as social beings because it is through the Rule of Law[21]—and our quest

---

lives, we might profit by keeping in mind Thomas Aquinas's first precept of the [natural] law: "Good is to be done and pursued, and evil is to be avoided." *See* Thomas Aquinas, SUMMA THEOLOGIAE I-II, Q. 94, A. 2.

[19] The use of words and how their meanings are understood by individuals is important to the enterprise of legal interpretation. Take for example this fictitious legislative text: "Prior to any public gathering, all gay assemblies must require a permit from the local police authority." In the context of the 1990's, this text would most likely refer to a requirement placing a prerequisite on a gathering of homosexuals. In the 1890's, however, it would have meant something very different. But what if the norm were enacted in the 1880's but is now being applied in the 1990's? A conscientious interpreter would presumably want to understand not only the meaning of the words in the contemporary context, but also what the authors intended to address and the goals the norm was designed to achieve.

[20] As lawyers, judges, legislators, administrators, and citizens, we all participate—in varying degrees—as both law finders [what does the law mean] and law makers [what is it that we need from the law]. See Anthony D'Amato, *Judicial Legislation*, 1 CARDOZO L. REV. 63 (1979) for a discussion between the role of judge as law finder versus the role of judge as legislator or law maker.

[21] I take the Rule of Law to mean the ability of members of a community to understand in a general fashion the legal rights and obligations all members of the community have regardless of their political, economic, social, religious, racial, ethnic, and sex status. In other words, regardless of which of these characteristics each individual has, he or she can expect the law to apply to each in the same essential way. For differing views of this foundational definition, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989), where the author examines concerns about judicial and law-maker discretion, and Laurence H. Tribe, *Revisiting the Rule of Law*, 64 N.Y.U. L. REV. 726 (1989),

for the best understanding of what the law within the American legal system means—that we avoid surprise about expectations concerning obligations and entitlements.[22] It is through the Rule of Law and the honest, humble search for the law's meaning that we come to understand more clearly the extent and limits of these obligations and entitlements.[23] A major

---

where the author makes a point of disagreeing with his understanding of Justice Scalia's explanation of the Rule by adding that it should be concerned not only with "regularity and predictability" but with "substantive justice" as well. *Id.* at 728. *See also* Richard H. Fallon, Jr. *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 56 (1997) (recognizing underlying truths about Rule yet suggests that some of its contemporary invocations are "too vague and conclusory" and, therefore, in need of more precise definition or understanding). For a critique of the "myth" of the Rule of Law, see John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 233 where the author suggests that the "myth" interferes with "a truly free society."

[22] *See, e.g.,* D'Amato, *supra* note 20, at 96-97, where the author states:

> Judicial opinions are not collections of personal policy preferences (though sometimes poor opinions are just that). Rather, they are part of the constraints upon judges to reach results that accord with the law. What is important is that the judge must justify the result he reaches. . . . We could all agree that once a judge determines that a case is a hard or a close case, he may sail off on legislative seas of his own charting. In that event, the "judicial legislation" thesis would accurately reflect reality. But 999 out of 1,000 judicial decisions do no such thing, and *most people expect judges to know the law and not invent it.* Although Cardozo tested the waters of judicial legislation in his lectures, his official opinions are a testament to the sound judicial practice of finding and applying existing law—not "laws" in the sense of rules, necessarily, but "Law" in the sense of the rules and principles that animate them and give them a purpose in the ordering of human affairs.

Id. at 96-97 (emphasis added).

[23] On the other hand, some surprises in the law may be welcome. See Anthony D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129, 1131-44 (1975) where the author constructs an imaginary pre-murder dialogue between Elmer Palmer (of *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889)) and counsel. Elmer is of course "surprised" by the outcome of the New York Court of Appeals opinion where, after murdering his grandfather, he is denied the right to take his bequest under the will even though the New York testamentary statute did not address whether an individual who accelerates the taking of a potential gift by killing the testator before he has an opportunity to change the will forfeits the gift. *Id.* at 1132. Elmer is surprised in the D'Amato dialogue because the law was silent, but should he? D'Amato concludes his essay by suggesting that the law, like an iceberg, is only partially visible to the naked eye—there is the obvious, and there is that which lies below the surface. *Id.* at

consequence of the Rule of Law and its coherent, rational, and moral interpretation is that citizens and their social, political, economic, cultural, and religious institutions obtain advance knowledge regarding where they stand in relation to one another.[24] I hasten to add that citizens should not be satisfied that the law and its Rule are forever inviolable, for they can be changed through other legal mechanisms such as the law—whether it is the Constitution or the work of Congress and the state legislature.[25] I hope to demonstrate in my ex-

---

1146.

[24] The words of Thomas More—lawyer, judge, statesman, martyr, and saint—in Robert Bolt's play *A Man for All Seasons* offer keen insight into the meaning of the Rule of Law. When his son-in-law-to-be, Will Roper argues a case for disobeying or avoiding the law to seek justice, More responds this way:

> The law, Roper, the law. I know what's legal not what's right. And I'll stick to what's legal . . . I'm *not* God. The currents and eddies of right and wrong, which you find such plainsailing, I can't navigate. I'm no voyager. But in the thickets of the law, oh there I'm a forester. . . . What would you do? Cut a great road through the law to get after the Devil? . . . . And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? . . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . . Yes, I'd give the Devil benefit of law, for my own safety's sake.

ROBERT BOLT, A MAN FOR ALL SEASONS (Random House, 1962) at 65-66. *See also* Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law,* 45 VAND. L. REV. 533, 546-58 (1992) (advocating mean between Legal Formalism in interpretation and excessive informality that leaves too much to discretion of judges; this mean is provided by practical reason).

[25] An important insight into this was offered by H.L.A. Hart in his essay, H.L.A. HART, *Positivism and the Separation of Law and Morals, in* ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 49, 71 n.40 (1983), where Hart relates the following anecdote about his American colleague Karl Llewellyn:

> One recantation of this extreme position [i.e., rules governing the work of courts] is worth mention. . . . In the first edition of (THE BRAMBLE BUSH), Professor Llewellyn committed himself wholeheartedly to the view that 'what these officials do about disputes is, to my mind, the law itself,' and that '*rules* . . . are important so far as they help you . . . predict what judges will do. . . . That is all their importance, except as pretty playthings.' Llewellyn, THE BRAMBLE BUSH 3, 5 (1st ed. 1930). In the second edition Llewellyn said that these were "unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth . . . . [O]ne office of law is to control offi-

amination the shortcomings of individual methods of legal interpretation. If the law is to be changed, it is best changed through the institutional procedures that we as citizens expect and rely upon rather than the surprise of interpretive process.[26] In large part, the justification for the Rule of Law is to enable us as citizens, colleagues, and (just possibly even) friends to know in advance what our relationships with one another are in the context of the normative principles that define and determine obligations and entitlements. The law is the cement which holds many of our relationships together. But when those relationships deteriorate, it is the law that helps us reconcile where possible and resolve where necessary the breakdown of these relationships. Consequently, it is through the interpretation of the law that we come to know what it is that the law gives or requires of us as citizens and companions in society.

The method in interpretation that I develop is not a theory in the sense that it is purely an abstraction or systematic conception that has little connection with practical implementation. When I embark on the enterprise of ascertaining the meaning of authoritative legal texts, I wish to reach the deepest understanding of the text from the widest variety of perspectives. These perspectives include: what the authors had in mind when they drafted the text; the context in which the text was written and the problems or issues it was designed to address; the context in which the text is to be applied; and the general understanding of the meaning of specific terms contained in the text, both at the time the text was written and during the time of its application. In essence, my method is concerned with both factual and temporal contexts that are relevant to understanding what the text means and, equally

---

> cials in some part, and to guide them even . . . there no thoroughgoing control is possible, or desired . . . . [T]he words fail to take proper account . . . of the office of the institution of law as an instrument of conscious shaping . . . ." Llewellyn, THE BRAMBLE BUSH 9 (2d ed. 1951).

Id. at 71, n. 40.

[26] One of the first examples is the *Locke* case investigated in my discussion on plain meaning interpretation.

important, what it does not. Because of the human limitations of my own perspective, I acknowledge the need to understand the text in a variety of ways, i.e., from the viewpoint of its authors, those who have applied the text, those interested in its linguistic analysis, those affected by the text's application, and those who must resolve the formal conflict that eventually surfaces when some authority establishes the text's meaning in an application and the person affected disagrees. Method in interpretation[27] must comprehend and assimilate the differences in the meaning of the text in its making, its application, and in the resolution of formal disputes over meaning.

Method in interpretation must also take account of the underlying philosophical issues: (1) the ontological—why does this text exist; (2) the epistemological—how to understand and know as much as possible about the text and its meaning(s); (3) the deontological—the right principles found in legal texts by which we regulate and pursue human existence; and, (4) the teleological—why does the text exist, and what goals or purposes does it or should it have? Method in interpretation is not a process simply to justify an already existing general understanding or conclusion about the meaning of the text. Rather, it is a process—not always easy and sometimes difficult, but very much worth the effort—to search for the objective truth about the text's meaning as it applies to general as well as specific instances of human existence and encounter.[28] By objective truth, I mean that the normative content of the legal text transcends the individual interpreter's predilections; the meaning of the text does not necessarily conform to some pre-determined understanding held by the interpreter which may limit one's ability to discern the truth about the text's meaning. While the interpreter remains an important subject in arriving at the meaning, neither the text nor the interpreter are held to some procrustean standard that limits the meaning of the text.

---

[27] I am indebted to Bernard Lonergan's work METHOD IN THEOLOGY, *supra* note 14. Lonergan was a Canadian philosopher and theologian who produced this 1972 masterpiece on developing a method for theology: (1) research; (2) interpretation; (3) history; (4) dialectic; (5) doctrines; (6) systematics; and (7) communications.

[28] For an interesting study of objectivity, see *Three Concepts of Objectivity*, *in* LAW AND INTERPRETATION 177-201 (Andrei Marmor ed., 1995), where the author identifies semantic objectivity [statements can be semantically objective regardless of their validity or truth], metaphysical objectivity [focus is on the world that surrounds the statements rather than the statements themselves], and logical objectivity [a certain class of statements is objective if it makes sense to grant truth values to the statements of that class].

Method in interpretation is not antithetical to but, indeed, relies on theory, both the analytical that critiques and the substantive that constructs ways of understanding better the meaning of public legal texts. It brings together the strengths that theories of interpretation have contributed to the art, if not the science, of understanding the meaning of legal texts. In doing so, it synthesizes their strengths and eschews their weaknesses.[29] Method in interpretation is not promoted solely on theory, but rather on labor as well. In other words, method in interpretation does not assert itself as the Rosetta stone of legal interpretation. It provides the way, sometimes arduous, to sift through much material—some historical, some contemporary, some easy to find, some concealed (but still discoverable if we only take the time to find it)—to determine what the text means not for all times but for the present case in which reasonable, perhaps even astute and open-minded, individuals cannot agree. Method in interpretation is a process, not one to justify a preexisting or subjective conclusion, but a search for the transcendent and objective truth about the meaning of legal norms. The law and its meaning should be remedial, depending on the interpretation used to explain it; however, the interpretation can also render harm, again, depending on how its meaning is derived and communicated. In essence, method in interpretation equips those engaged in its process with the ability to encounter normative texts so that their application contributes to, rather than counters, human flourishing.

---

[29] I have addressed earlier the topic of synthetic interpretation in my articles. Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look At* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 112-20 (1992), and Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Recurring Question—Clarification or Confusion,* 16 SETON HALL LEGIS. J. 551 (1992). While this present essay relies on some of my earlier work, it is my goal to advance and refine my basic thoughts about interpretive methodology which I developed almost a decade ago.

Method in interpretation necessitates both humility and honesty on the part of those who engage in its process. The humility needed is of the sort that cultivates an awareness and an acceptance of the limitation of the text (it was not designed to address all issues of social, political, economic, and moral conflict for all times) and of the interpreter (our knowledge and understanding of the text will always be characterized with some incompleteness).[30] The honesty required is essential to ensure that justification rather than rationalization is produced to support the understanding and explanation of the meaning of the law. Yet, recognition and reception of this humility and honesty are sources not of weakness, but of strength. This is so because humility and honesty of which I speak provide the incentive or catalyst for disciplining the mind and the scope of the inquiry as well as for drawing on the patience needed to determine best what the text is about. Moreover, humility and honesty provide inducement to enter into civil discourse with others that leads to more harmony and less discord in the application of the meaning of the text, once it has been identified. It is humility and honesty which concurrently remind the interpreter of the history of the text, the present moment in which it is being examined, and its future which has yet to unfold.[31]

---

[30] *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269 (1997) (critiquing role Dworkin is willing to give to judges in enterprise of Constitutional interpretation). McConnell argues that the

> constitutional text, historically understood, has reference to a slowly evolving, common law understanding of rights, and that the people who instituted the Constitution expected that their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change . . . . All of the various constraints on judicial discretion can be understood as a means of tempering judicial arrogance by forcing judges to confront, and take into account, the opinions of others—whether they be the Framers of the Constitution (text and original understanding), the representatives of the people (the presumption of constitutionality), the decentralized contributors to longstanding practice (tradition), or judges in earlier cases (precedent).

Id. at 1292.

It is the humble as well as the noble of spirit and mind that will recognize both the familiar and the new in method in interpretation. To borrow from Bernard Lonergan's definition of "method," it becomes a part of the nature of the lawyer, the citizen, and the public official who acknowledge the merit of developing and practicing that "normative pattern" of recurring and related operations which generate "cumulative and progressive results."[32] This nature in turn becomes a habitual pattern and a type of virtuous conduct which leads the individual engaged in the process toward a better understanding of the law (the application of epistemology) and its goals of service to human beings (the application of teleology).

But is the benefit derived from this process restricted to those who encounter, engage, and embrace it? As I shall structure this process, it should not, as method in interpretation is simultaneously a personal and a social process. It is personal because an individual must consciously pursue the process. It is social because once the individual commences the process he or she must go beyond the self and communicate the meaning or meanings which are identified.

As with Lonergan's eightfold division, the point of departure is research.[33] This is the enterprise of searching for and making available the data integral to the process. As the data is collected, assembled, and evaluated, the second functional specialty—interpretation—is triggered. It might seem odd that what appears to be the goal of the method, i.e., interpretation, is encountered so quickly. The interpretation of which

---

[31] In a recent article, Christian G. Fritz has pointed out in a Constitutional context that the assumed consensus of meaning that has historically existed is in reality a fiction. *See* Christian G. Fritz, *Alternative Visions of American Constitutionalism: Popular Sovereignty and the Early American Constitutional Debate*, 24 HASTINGS CONST. L.Q. 287, 356-57 (1997) (examining early constitutional materials and concludes that there existed variety of understandings of phrase "popular sovereignty.").

[32] *See* LONERGAN, *supra* note 14, at 14.

[33] *Id.* at 127.

Lonergan speaks here is the effort to understand initially what is meant by the text.[34] Because the process underlying method is dynamic rather than passive or static, the meaning derived at this stage is preliminary rather than final. Nonetheless, it is essential that those who are engaged in the process begin their search for understanding about the text's meaning at an early stage.

This initial understanding is embryonic—it must develop and mature. Those pursuing the method must now engage the historical which relates to and undergirds the text.[35] Fundamental questions about "who," "what," "when," "where," and "why" as they relate to the text must be addressed. The archaeology of method is not designed to restrict the meaning that may ultimately be discovered. On the other hand, the historical specialty gives a sense of rootedness—a historical context—from which those engaged in the method receive direction. History here is not a fetter that confines, but a compass that directs and guides.[36] With the data, a sense of preliminary meaning, and the appreciation of the historical, those journeying by the way of method are now prepared for the fourth specialty—dialectic.[37]

Because method is a process that does not assume an *a priori* meaning, its synthetic component of bringing together the specialties developed by Lonergan can be simultaneously concrete, dynamic, and even contradictory. Rather than arresting the process, dialectic fosters it and promotes the desire to refine and perfect that which has already been encountered by explaining that which still needs explanation and by resolving contradiction where conflict has been uncovered.

With dialectic, method in interpretation is ready to move into a conversion in which the subject has been affected by and is affecting that which has so far been encountered.[38] The conversion prepares the subject for immersion into the doctrines—the judgments of fact and the judgments of value—which underlie the texts that have been at the focus of this process.[39] The subject is now ready to evaluate and express judgments of the facts and values which have been revealed by the process developed at this stage. But with the development and acceptance of doctrines, as Lonergan defines them, there comes the need to explain them. The seventh specialty, systematics, emerges as the device or component that constructs an appropriate system of conceptualization.[40] It is the ability to conceptualize that allows the subject engaged in the methodical process to explain to others what has been discovered and accepted as the meaning of the text under investigation. Systematics is especially suited to targeting and minimizing, if not eliminating, any contradictions or tensions within the meaning that has been developed up to this point.

---

[34] *Id.*

[35] *Id.* at 128.

[36] For an interesting and important discussion about historical methodology in its application to the law, see William W. Fisher, III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997).

[37] *See* Lonergan, *supra* note 14, at 128-29.

Of course, with the development of systematics, the invitation to participate in the final specialty of Lonergan's method is at hand: communication.[41] Since systematics and doctrines imply the need to engage other subjects, external relations with individuals beyond the initial person who began the process become inevitable. It is through these external relations that the discoveries and conclusions of the initial subject are passed on to others in the community. This communication not only passes on that which has been discovered; it also serves as a catalyst that reinvigorates the process by inviting new participants into the search for the transcendent and objective truth that is to be found in the normative text.

---

[38] *Id.* at 130.

[39] *Id.* at 132.

[40] *Id.*

[41] *Id.* at 132-133. In another context, Lon Fuller emphasized the role of communication in the quest for the meaning of law. See LON FULLER, THE MORALITY OF LAW, 186 (2d ed. 1964), where the author says in Chapter IV, *The Substantive Aims of Law*:

> Communication is something more than a means of staying alive. It is a way of being alive. It is through communication that we inherit the achievements of past human effort. The possibility of communication can reconcile us to the thought of death by assuring us that what we achieve will enrich the lives of those to come. How and when we accomplish communication with one another can expand or contract the boundaries of life itself.

With the structure of Lonergan's method in the background, I shall now begin to develop the particulars in my method of interpretation for legal texts. Although I focus on certain legal texts in the case illustrations, particularly statutes and the Constitution, the method I develop is generally applicable to the three general categories of public legal texts: constitutions, statutes, and regulations. The balance of this essay will develop two inquiries. Part II will be a critical examination of the variety of interpretive methods I previously identified at the beginning of this essay. I reiterate that, while each of these methods is limited in the meanings of the legal texts that each can offer, they all provide components which are essential to the method in interpretation which will be constructed in Part III of this essay. Thus, I now turn to an examination and evaluation of the more common methods of interpretation: plain meaning, textualist, intentionalist, originalist, purposivist, contextualist, and dynamist. I shall also look at several other methods of interpretation less addressed by today's more popular theories: the common law, canons of construction, and Dworkin's principles and coherence method.

II. AN EXAMINATION OF CONTEMPORARY INTERPRETIVE METHODS

In beginning my investigation, I want to establish a basic understanding about terms and concepts that I shall use and address throughout my examination and discussion. What do I mean by interpretation? In essence, it is the epistemology of law—what does the law mean to us in how we live our lives as individuals within communities? What is my understanding of the purpose of each legal text? These texts provide us with the rules and principles we follow as members of our communities to guide and regulate the exercise of our conduct which often has effects on the existence of our fellow citizens. What tools may or should the interpreter turn to in order to reach an accurate understanding of what the words in the legal text undergoing examination mean?[42] Here, we are concerned with the meaning of words, the syntax and grammar of the texts, and the history of the drafting and evolution of the meaning of the text.

Reaching some preliminary conclusion about the role and function of the legal text is an inextricable component of the interpretive process. The text's principal role often appears to be one of general guidance to citizens and enforcers of law. Even the most carefully drafted of texts must be more general than specific.[43] The tasks of lawyers (as counselors and advocates), agencies as administrators, and judges frequently intersect because they are all interpreters of these texts. While their specific roles may vary and their precise responsibilities differ, they all exercise interpretive functions. As an interpreter, each has a duty to explain the meaning of the text—that is, its implications and impact on individuals and society—within the context of a particular factual application. Much of the work of interpretation goes beyond discovering the general tenor of the text. It frequently involves fine-tuning the meaning of broad language so it will be relevant to the factual and temporal context. Because language of legal texts such as statutes, regulations, and constitutions is usually general, the interpreter must give it a particularized meaning that has bearing on this context.

---

[42] The issue of understanding the meaning of language is not new. Saint Paul advised the Christian community in Corinth with these words: "Unless you speak intelligible words . . . how will anyone know what you are saying? You will just be speaking if to the air. Undoubtedly there are all sorts of languages in the world, yet none of them is without meaning." 1 *Corinthians* 14:9-10.

[43] Because of their broad scope as well as the complexity of their subject matter covered, programmatic statutes ordinarily rely on general language. While they may identify some particulars, they typically delegate to the enforcing agency the responsibility to develop most of the particulars (normally through regulations) which implement the programs. *See* Frank Grad, *The Ascendancy of Legislation: Legal Problem Solving In Our Time*, 8 DALHOUSIE L.J. 228, 251-57 (1985). However, there may be some new reservations on the part of Congress to give the executive branch much latitude as to implement statutes and promulgate regulations. Before 1983, many of the programmatic statutes authorized one house of Congress to exercise a veto over agency rulemaking or other action if Congress disagreed with the implementation steps taken by the agency. *See* Jacob K. Javits & Gary J. Klein, *Congressional Oversight And The Legislative Veto: A Constitutional Analysis*, 52 N.Y.U. L. REV. 455 (1977). The legislative veto was declared unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). However, Congress still retains considerable influence over agency implementation of statutes through its appropriations, investigation, and general oversight powers. Exercise of the appropriations and oversight mechanisms are Congress' version of the carrot and stick; they are particularly useful in extending Congressional influence into agency interpretations and implementations of statutes. The exercise of this indirect control over what the executive does (or does not do) with programmatic statutes may be more evident when the President (or independent agency head) is at odds with Congress over how legislation is to be applied. The Senate, moreover, can influence agency activity during the confirmation process of agency officials nominated by the President but subject to the advice and consent of the Senate. Peter Strauss has noted that, while Congress still delegates a great deal of responsibility to the agencies, it may be writing some programmatic statutes (or their amendments) with a greater degree of specificity than before. *See* Peter L.

A. A Presupposition: Legal Texts are General and Open Textured

A basic contention shared by many is that legal texts, although general in nature,[44] are geared to put both citizen and official on notice of the basic guidelines and requirements imposed by the authors who have been granted the authority to draft normative texts for the community they serve. At the same time, however, these texts, while having some elasticity, still have limitations on what they can or might mean. If the interpreter makes an effort to stretch the meaning beyond that which their open texture or elasticity can bear, the interpreter will encounter confusion and strong disagreement with others. These normative texts generally referred to as the "law of the community" can do many things,[45] but above all else they

---

Strauss, *Legislative Theory and The Rule Of Law: Some Comments On Rubin*, 89 COLUM. L. REV. 427, 434-35 (1989).

[44] *See* H.L.A. HART, THE CONCEPT OF LAW 121 (2d ed. 1994). See also BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 7-35 (1993) for an investigation of Hart's concept of open texture as a "position on judicial interpretation half-way between formalism and rule sceptcism [sic]."

[45] In order to accomplish some previously identified purpose, legal texts may grant rights to individuals; they may also impose particular responsibilities or general duties on individuals and the government.

have the function of assisting individuals, society at large, and the political culture in understanding and responding to the economic, social, political, and other public issues which face and challenge the community.[46]

Due to their general wording, these legal texts tend to be open-textured.[47] H.L.A. Hart used the term *open textured* to explain the following: since laws address large groups of people (frequently, entire political cultures), they must be general in nature; they cannot give particular direction to individuals separately.[48] By way of illustration, Hart suggested that in many applications, legislation will operate smoothly in that there will be little, if any, difficulty in understanding what the text means in the great mass of ordinary uses.[49] However, there will be some instances in which the legal text's application is in question, i.e., the meaning of the norm is elusive or indeterminate. This indeterminacy is what Hart identified as the rule's open texture.[50] By possessing the quality of open texture, the meaning of a legal text can be difficult to determine. Take, for example, the meaning of a municipal ordinance that bans "the standing or parking of all vehicles within one hundred feet of hospital entrances." The underlying norm seems clear at first, but then it becomes somewhat indeterminate when particular factual contexts arise. Should the text be construed to prohibit ambulances from parking next to hospital entrances when they transport patients requiring emergency medical attention? Or would a common sensical approach take the position that in spite of the general prohibition, emergency vehicles like ambulances should be exempted? This does not mean that legal texts are worthless and offer no substantive guidelines to the individuals whose conduct may be regulated by them.[51] How and to what extent such a text applies to particular factual contexts is the subject of interpretation. Let me use an example to illustrate the open texture of one legal text and issues surrounding the interpretation of this statute.

---

[46] *See* Grad, *supra* note 43, at 256-57.

[47] *See* HART, *supra* note 44, at 120-32. Because of the general wording and open texture of legal texts, Hart concluded that law can not be "mechanically" applied. *Id.* at 128.

> It is a feature of the human predicament (and so of the legislative one) that we labour under two connected handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions. The first handicap is our relative ignorance of fact: the second is our relative indeterminacy of aim. If the world in which we live were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility . . . . This would be a world fit for "mechanical" jurisprudence.

Id.

[48] *Id.* at 121.

[49] *Id.* at 124.

[50] *Id.* Hart further states that this uncertainty or open texture of legislation is part of the cost of "general classifying words" which are then applied to specific facts. *Id.*

Most of us in the contemporary American culture encounter daily general rules or conventions that guide or influence our conduct. In a recurring hypothetical which I shall use throughout this essay, the people who live in a town use the community park for different forms of recreation, e.g., jogging, bicycling, walking, and picnicking. A convention has developed over the years where the town's citizens do not drive their automobiles on the paved paths that traverse the park.[52]

However, one day a teenager who has just received his driver's license drives the family car through the park on a lark—perhaps inspired to go, as Captains Kirk and Pickard have said, where no one has gone before. The police were called by several irate residents who complained that the boy should not have driven the car through the park. Although no one was endangered by his stunt, many of the traditional users of the park envisioned the dangerous consequences of driving a car through this particular park. When the boy drove through the park, he violated a longstanding convention observed by most townfolk. Notwithstanding this convention, there was no official rule (i.e., a law such as a town ordinance) addressing the subject of automobiles in the park.

---

[51] Hart suggests that the "root of indeterminacy" of legal texts is that their language must be more general than particular because of our human inability to predict or "anticipate the future" and the social, political, and economic issues the future may pose. *Id.* at 127. Kent Greenawalt, who studied with Hart about thirty-five years ago, has developed a standard by which we can address and deal with the law's open texture. The legal facet of this standard is based on what reasonable lawyers would agree is the meaning of a statute, or some other form of law, within a given context. *See* KENT GREENAWALT, LAW AND OBJECTIVITY (1992) based on *Objectivity And Law*, The Julius Rosenthal Lectures, Northwestern University Law School (March 13-15, 1989).

[52] The basis for this example comes from a synthesis of examples used by Kent Greenawalt, *see supra* note 51; Hart, *supra* note 44; Paul Brest, *The Misconceived Quest For The Original Understanding*, 60 B.U.L. REV. 204, 209-13 (1980).

In response to this incident, a number of community members petitioned the municipal government to take action ensuring that the incident would not be repeated in the future. The town council, after going through the necessary preliminaries for enacting ordinances, passed a new law "prohibiting all motor vehicles from the park." The local inhabitants (as well as everyone else) had been given official notice (either actually or constructively) that certain conduct, i.e., taking motor vehicles into the park, would be prohibited from now on. It would now seem that the citizens of the town could go back to the peaceful enjoyment of their park.

One day, however, a senior citizen drove her motorized wheelchair through the park. Although she was aware of the new ordinance, she assumed that motorized wheelchairs were not covered by this law because she, like many other citizens of the town, considered the motorized wheelchair to be more like a bicycle or a baby carriage than an automobile—a motor vehicle. However, a municipal police officer on patrol cited the owner-driver of the motorized wheelchair for violating the ordinance. The citing officer did so on the basis that the motorized wheelchair performed a function closely related to that of a motor vehicle, i.e., taking a person from one place to another through the use of a self-propelled engine that relied on mechanical rather than human power. The elderly woman, however, considered that this motorized wheelchair was more analogous to the legs which other people who were not disabled like herself used to get around.[53] This incident illustrates that there was a difference of opinion about whether a motorized wheelchair is a motor vehicle or not and the meaning of the new ordinance as applied to these circumstances.[54] The open texture of the ordinance raises the question of whether motorized wheelchairs are motor vehicles subject to the enforcement of laws prohibiting motor vehicles from the park—be they automobiles or motorized wheelchairs. I shall return to this hypo-

---

[53] Several of my students who are wheelchair-bound have commented to me in

---

our discussions of this hypothetical that they consider their wheelchairs as their legs or leg-substitutes. I am indebted to them for their patience toward me and the thoughtful insight that have provided which has enabled me, and I suspect others, to see more in this hypothetical than I originally did.

[54] I have taken the liberty of improvising on this example by relating to a circumstance which arose in Kentucky several years ago when an intoxicated paraplegic was cited for operating a motorized wheelchair while under the influence of alcohol. In 1992 James Jaggers, a man who got about town on an battery-powered motorized wheelchair was cited for driving his wheelchair while under the influence of alcohol. *See* David McGinty, *The Midnight Ride of James Jaggers*, THE COURIER-JOURNAL, Monday, July 20, 1992, at 1C. The state statute under which Mr. Jaggers was arrested defined a motor vehicle as any agency "for the transportation of persons or property over or upon the public highways . . . which are propelled otherwise than by human power." *Id.* Mr. Jaggers was operating his wheelchair for a short distance on a municipal street because the sidewalk on which he had been traveling was obstructed. *Id.* When lawyers involved with the case contacted legislators to determine if it was their intent to include motorized wheelchairs as motor vehicles, it seemed that no lawmaker contemplated the inclusion of wheelchairs. *See Wheelchair Tests a Drunken-Driving Law*, THE NEW YORK TIMES, June 21, 1992, § 1, at 16. The judge presiding over the case eventually ruled that an electric wheelchair is a motor vehicle. *See* McGinty, *supra* at 1C. For a variety of state cases dealing with the question of whether other conveyances are motor vehicles and riding while intoxicated, see State v. Guidry, 467 So. 2d 156 (La. Ct. App. 1985) (holding bicycle not "other means of conveyance" under DUI statute); Commonwealth v. Griswold, 459 N.E.2d 142 (Mass. App. Ct. 1984) (holding statute specifically excluding mopeds from definition of "motor vehicle" did not prohibit charge of operating moped upon public way while intoxicated because second statute mandates that moped operators are subject to traffic laws and regulations of state); State v. Lyons, 586 A.2d 1378 (N.J. Super. Ct. App. Div. 1978) (holding moped to be motor vehicle for purposes of state DUI statute); State v. Machuzak, 546 A.2d 1099 (N.J. Super. Ct. Law Div. 1988) (holding bicycle not motor vehicle); State v. Tehan, 463 A.2d 142 (N.J. Super. Ct. Law Div. 1982) (holding penalties regarding fines, community service and imprisonment contained in DUI statute applied to operator of bicycle); State v. Euton, 665 N.E.2d 775 (Ohio 1996) (holding horse is not vehicle); State v. Hildebrand, 531 N.E.2d 775 (Ohio Ct. App. 1987) (holding bicycle is vehicle for purposes of DUI statute); Wauseon v. Badenhop, 459 N.E.2d 867 (Ohio 1984) (holding tractor not motor vehicle).

thetical and its interpretive implications later in this essay.

The question of open texture involving a similar question (i.e., whether an airplane was a motor vehicle under the National Motor Vehicle Theft Act) was addressed in *McBoyle v. United States.*[55] The Tenth Circuit concluded that airplanes, what defendant McBoyle had stolen, were motor vehicles, and thereby covered by the statute.[56] Section three of the statute made criminal the act of anyone who "shall transport or cause to be transported in interstate commerce a motor vehicle, knowing the same to have been stolen. . . . "[57] Section two of the statute defined motor vehicle to "include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails."[58] The majority found that McBoyle had violated the statute and concluded "that the phrase, 'any other self-propelled vehicle,' includes an airplane, a motorboat, and any other like means of conveyance or transportation which is self-propelled and is of the same general class as an automobile and a motorcycle."[59] The majority supported its conclusion by consulting the then-contemporary definitions of vehicle, "that which is used as the instrument of conveyance or communication".[60] However, in writing for a unanimous Supreme Court, Justice Holmes disagreed with this conclusion. He understood that a motor vehicle is a device for "running on the land"; therefore, a plane which "flies" could not be considered running on the land.[61]

But, how would Justice Holmes have understood the meaning of the law and applied it to the case if McBoyle had taxied the plane from one state to another rather than flying it? Or, how would he have addressed the interstate theft of a stolen airplane that was transported across state lines on a flatbed truck? The factual context of the norm's application can have an important bearing on the legal text's meaning. In the *McBoyle* case, a plane could run on the land and thus meet the critical element of Justice Holmes' definition of a motor vehicle.

---

[55] 283 U.S. 25 (1931).

[56] McBoyle v. United States, 43 F.2d at 273, 274 (10th Cir. 1930), *rev'd,* 283 U.S. 25 (1931).

[57] *McBoyle,* 43 F.2d at 275.

[58] *Id.* at 274.

[59] *Id.*

[60] *Id.*

[61] *McBoyle,* 283 U.S. at 25.

At this stage, let us return to the municipal ordinance of my underlying hypothetical. Other questions about the meaning of the ordinance could begin to arise once the context of application changes. Take these for example: would the local paramedics be permitted to drive their ambulance into the park to help assist someone who might require emergency medical treatment?[62] What if a motorist driving his car on the street adjacent to the park had a break-down during rush hour traffic and pushed his automobile onto a nearby path of the park in order to get the disabled vehicle out of harm's way? Would his action violate the ordinance? What if the town's recreation committee decided to install and operate an amusement park with a miniature car racetrack within the park? Would their plan run afoul of the ordinance?

These examples demonstrate the open texture of the ordinance that was enacted to ban motor vehicles from the park. In some, the question surfaces about whether the equipment [e.g., a bicycle with a small auxiliary motor; a motorized wheelchair] is a motor vehicle covered by the statute. In others, the equipment may be a motor vehicle, but does the vehicle's [e.g., a fire truck, a police car, a municipal trash-collection truck] presence in the park conflict with the provisions of the ordinance? Would their presence be at odds with the reasons and purposes for which the ordinance was enacted in the first place? These issues raise the same fundamental question: how is the ordinance to be interpreted in the context of each case? In my first example involving the motorized wheelchair, both the woman and the officer took the same open textured statute and interpreted it in conflicting ways.

In the examination and discussion that follow, we shall see that the issues concerning the open texture and interpretation of legal texts are not restricted to the hypothetical ordinance prohibiting motor vehicles from the town park. The simple example of the motorized wheelchair demonstrates how two presumably reasonable people, each who considers one's self to be a law-abiding citizen, can reach independent and conflicting interpretations about the meaning of a public legal text that addresses the commonplace events of everyday life. In demonstrating that the issues of open texture and interpretation briefly encountered in this example are not restricted to this hypothetical, other legal texts from state and federal sources shall be examined in the following discussions that probe the use of different interpretive methodologies. Because of the open texture of legal texts, many interpreters can and do find themselves at odds with the conclusions about the meaning of the same legal texts reached by other interpreters.[63] The diversity of interpretation can and often comes from one interpreter giving the text a more obvious meaning and another interpreter giving the same text a less obvious meaning.[64] The fact that there is more than one interpretation given to the same text does not mean that only one is correct and the others are incorrect.

---

[62] This example is derived from a hypothetical used by Profs. Hart and Greenawalt. *See* Hart, *supra* note 44, at 125-26; Greenawalt, *supra* note 51, at 44.

One measure of correctness is whether the interpretation will promote, rather than defeat, the social, political, economic, and other goals the legal text was enacted to address. Needless to say, individual interpreters may share some views as well as disagree on others regarding how the statutory or constitutional provisions are to be used to address these concerns in specific cases. Reasonable and skilled people trained in legal interpretative methodology can arrive at different conclusions about the meaning of a particular statute, regulation, or constitutional provision, particularly when they rely on good, logical reasons supporting the conflicting interpretations.[65] Since different approaches to determining the meaning of legal texts often supply the foundation for reaching opposite conclusions, it would be useful to obtain familiarization with the variety of approaches employed to interpret legal texts.[66] My inquiry will now investigate these methods which I have previously identified as plain meaning interpretation, textualism, intentionalist and originalist interpretation, purposivist, and contextualist. In addition, I shall also examine several other methods less frequently used but which remain in the arsenal of the interpreter.

---

[63] I make the assumption, unless otherwise stated, that each of these interpreters is a rational and reasonable person possessing a sufficient level of intelligence to interpret legal texts. Most interpreters are reasonable people who can agree on the meaning of some of the important elements of a statute; however, they cannot always agree on all such elements in all cases.

[64] *Cf.* Neil MacCormick, LEGAL REASONING AND LEGAL THEORY 206 (1978).

B. *Contemporary Theories of Interpretation*

(1) *The Plain Meaning of the Text*

The plain meaning method of interpretation looks exclusively at the language of the statute which deals with the particular issue being examined.[67] In its most basic terms, within the context of American legal scholarship, the plain meaning rule has been long-recognized to exist, "where the language of an enactment is clear and construction according to its terms does not lead to *absurd or impractical consequences*, the words employed are to be taken as the final expression of the meaning intended."[68]

---

[65] *Id.* at 206-07.

[66] I shall devote considerable attention to my own theory of interpretation in the third and final part of my inquiry. At this stage, however, I want to introduce the reader with existing options of interpreting legal texts.

[67] *See generally* ARTHUR MURPHY, *Old Maxims Never Die: The "Plain Meaning Rule" and Statutory Interpretation In The "Modern" Federal Courts*, 75 COLUM. L. REV. 1299 (1975) (discussing how courts look only at meaning of statute rather than legislative intent).

[68] United States v. Missouri Pacific R. R., 278 U.S. 269, 278 (1929) (emphasis added). But even some plain meaning adherents (or at least interpreters sympathetic to the plain meaning approach) recognize a need for flexibility in referring to outside sources. For example, Justice Holmes suggested that the plain meaning rule is more of an axiom of experience than a rule of law and should not preclude "consideration of persuasive evidence if it exists." Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928). Thus, if, "Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to

The conventional wisdom underlying this rubric of legal interpretation is that the best way to ascertain the meaning of the language used is to restrict the examination to the disputed language itself.[69] Take, for example, the elusive meaning of

---

it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute." *Id.* Almost thirty years earlier, the Court expressed its reluctance to consider floor debates and remarks as aids in interpreting the construction members of Congress would have placed on language when the statute was enacted. However, "the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed." United States v. Trans-Missouri Freight Ass'ns, 166 U.S. 290, 318-19 (1897).

[69] While there are many critics of the plain meaning rule, one contemporary scholar has provided substantive insight about why such a rule can make sense. Not all interpreters are lawyers, judges, or other public officials schooled in the niceties of statutory construction. Many are ordinary citizens who have a duty to abide by the many legal texts that regulate their conduct. Neil MacCormick has offered support for observing a plain meaning rule of interpretation because,

> The idea that there is, or could be a "literal rule" of statutory interpretation postulates or presupposes this possibility that statutory words normally have an obvious or plain meaning. In so far as that is true, there are no doubt good grounds why judges should approach the application of enactments with some presumption in favour of applying whatever is the more "obvious" of the meanings appealed to by litigants before them. In a democratic constitution, it is the elected Parliament which must enact new laws; whether or not all the members of the legislature have the least idea of the contents of clauses of Bills, the least unsuccessful way of securing that the will of elected legislators will prevail will be to take the words enacted by them at *their face value* and so far as possible *apply them in accordance with their plain meaning. . . .* And *the ordinary citizen will be able to take statutes at their face value.*

MacCormick, *supra* note 64, at 204 (emphasis added). Another commentator, however, makes a good point by asking if a plain meaning rule can really exist if, in its application, the interpreter must make sure that the literal or plain meaning construction does not lead to *absurd* or *impractical* consequences. In other words, in order to ascertain if the construction leads to absurd or impractical consequences, it is necessary to go beyond the text—beyond the plain meaning. *See* MICHAEL MOORE, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 280 n.281 (1981). *But see*, James Fagan, *The Legal Phoenix: The Plain Meaning Rule is Dead, Long Live the Rule!*, 29 CAL. W. L. REV. 373, 392 (1993) (where author makes case for plain meaning interpretation based on separation of powers doctrine and ability "of all members of a democratic society . . . [to] review any legislative enactments and understand the law[']s application."). However, Melvin Eisenberg contends that the plain meaning approach is both "intellectually incoherent" and "institutionally impermissible" because it neutralizes the ability of judges to be "faithful servants of the legislature." Melvin Eisenberg, *Strict Textualism*, 29 LOY. L.A. L. REV. 13

the Second Amendment which acknowledges the "right of the people to keep and bear arms." Does this mean, as it seems to be understood by many, that Americans have a right to own and keep firearms? Many argue "yes," while many others contend "no."[70] But can it also mean that people have some Constitutionally protected right that applies to a personal injury case in which the plaintiff has lost her two upper limbs as a consequence of the defendant's negligence? Resolution of this latter issue is contingent on what do the words mean—what do they suggest to the ordinary individual and how are they used in every day society? This is the heart of plain meaning interpretation.

David Strauss recently contended that the best justification for plain meaning interpretation is that "it provides a basis of agreement that reduces the danger of unproductive and costly disagreement."[71] Still, the rule warns that absurd or impracti-

---

(1995). Ronald Dworkin draws the distinction between "fidelity to the Constitution's text" and "fidelity to constitutional practice." Ronald Dworkin, *The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve*, 65 FORDHAM L. REV. 1249, 1249 (1997). Lonergan himself offers some vital insight about the various degrees of the meaning of language and words which should be pondered. *See* Lonergan, *supra* note 14, at 71, where the author points out that as language develops, "there emerges a distinction between ordinary, technical, and literary language. Ordinary language is the vehicle in which the human community conducts its collaboration in the day-to-day pursuit of the human good."

[70] *See, e.g.*, Randy Barnett & Don B. Kates, *Under Fire: The New Consensus on the Second Amendment*, 45 EMORY L.J. 1139 (1996); Scott Bursor, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125 (1996); Anthony Dennis, *Clearing the Smoke from the Right to Bear Arms and the Second Amendment*, 29 AKRON L. REV. 57 (1995); Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103 (1987); Kevin Szczepanski, *Searching for the Plain Meaning of the Second Amendment*, 44 BUFF. L. REV. 197 (1996); William Van Alstyne, *The Second Amendment and the Personal Right to Bear Arms*, 43 DUKE L.J. 1236 (1994).

[71] David Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1581 (1997). *See* BIX, *supra* note 44, at 137-54 (pointing out Hart's concern that confusion and misunderstanding is generated if interpreters try to understand legal concepts in terms of standard definitions). Such an approach to interpretation tends to ignore the fact that it is often members of the laity who approach legal texts knowing that such texts have an impact on their lives and would come to expect that the legal norms are to be understood according to standard definitions, i.e., common understanding of the laity.

cal consequences would necessitate abandonment of the rule in those cases. Anthony D'Amato has added that application of the rule must be avoided where it "produces grave injustice."[72] For example, in my hypothetical involving the town ordinance banning motor vehicles from the park, a plain meaning interpretation of the act would most likely ban any mechanical device considered to be a "motor vehicle." Assuming that the ordinance has a definitional section which would eliminate most questions about whether something is a motor vehicle, a plain meaning interpretation would probably state that the presence of the motorized wheelchair, ambulance, disabled automobile, and the miniature racing cars would violate the ordinance. This method of interpretation usually would not dissect the definition of "motor vehicle" to ascertain if the motorized wheelchair or miniature racing cars should be included. Neither would the interpreter who uses this method examine the teleology of the statute (i.e., what are its goals: protection of people; promotion of aesthetics; reduction of auto emissions in the park?) in an effort to determine what the goals of the enacting authority were in promulgating it.

It would then seem that the factual context, the surrounding general circumstances, the history of the legislative process underlying the statute's passage, rules of construction, and examination of intent or purpose are irrelevant to the interpreter's determining the meaning of the statute. What is relevant to plain meaning interpretation are the words of the statute. All other considerations are of subsidiary importance.

---

[72] Anthony D'Amato, *Counterintuitive Consequences of "Plain Meaning,"* 33 ARIZ. L. REV. 529 (1991). He concludes this essay as follows:

> It is our sense that the underlying justice considerations that gives us a feel for rules of the road as well as for any legal rules. We follow these rules because in most circumstances it would be unjust not to follow them. But when it *would* be unjust to follow a rule, then the courts should throw away literalness, "plain language," textualism, and all other seductive trappings of formalism, and do what they are supposed to do: dispense justice to the parties.

Id. at 576. However, D'Amato has argued elsewhere against unrestrained judicial legislation. *See*, D'Amato, *supra* note 12, at 526.

An interesting illustration of the plain meaning rule is offered in the case of *United States v. Locke*.[73] In *Locke*, the Supreme Court interpreted a provision in the Federal Land Policy and Management Act (FLPMA) of 1976 mandating that holders of unpatented mining claims annually reregister the claim "*prior to* December 31."[74] For some interpreters, including the majority of the Court, the language of the statute was plain and unambiguous: it means what it says, no ifs, ands, or buts about it.[75]

If a claim were not registered with the Bureau of Land Management by the deadline specified by the statute, it would be forfeited.[76] In this case, the Locke family who held rights to certain Federal mineral properties filed the annual registration on December 31, and the Bureau of Land Management determined that the holder of the unpatented mining interest forfeited its claim by failing to reregister it in a timely fashion, i.e., it did not file on or before December 30.[77] In writing for the majority, Justice Marshall upheld the Bureau's declaration of forfeiture. Even though the Lockes indicated that they had previously been told by the Bureau that they could file their license renewals on December 31,[78] the majority concluded that "the plain language of the statute simply cannot sustain the gloss [the Lockes] would put on it."[79] Conceding that the language may be clumsy, the majority still insisted that its meaning was clear.[80] Justice Marshall cautioned that judges must defer to "the supremacy of the legislature,"[81] even though the legislature "might have acted with greater clarity or foresight" because courts do not have the authority "to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do."[82] While these concessions more than suggest that the meaning of the statute was far from unambiguous, Justice Marshall continued his justification for plain meaning interpretation:

---

[73] 471 U.S. 84 (1985).

[74] FLPMA §314(a), 43 U.S.C. §1744(a) (emphasis added).

[75] Others have disagreed with this conclusion. Judge Posner has stated that, "[T]he language is clear, however, only if significant contextual circumstances are ignored. The Court's approach was analogous to that of a platoon commander who . . . having received an order that is clear, but also clearly erroneous because of a mistake in transmission, nevertheless carries out the order as received, rather than trying to determine what response would advance the common enterprise." Richard Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 205 (1986). As we apply to the realm of legal interpretation Judge Posner's analogy of the military subordinate who is to carry out the order of the superior, we must keep in mind of the significant differences between the military organization and the world of law. Most notably, the legislature which enacts the statute is not the superior of the executive or the courts; it is the co-equal which does have the Constitutional authority to draft and enact legislation. However, the executive is charged with the responsibility of both interpreting the language of the statute and enforcing it. Furthermore, the judiciary are charged with the duty of also interpreting the law and having the final say on what it means.

[76] In the *Locke* case, none of the contextual circumstances suggested by Judge Posner really seem to apply. Even if the date in the statute was some other one, e.g., January 1, it would not affect the purpose underlying the statute, viz. to provide a mechanism for the forfeiture of claims not timely patented. In FLPMA § 314(c), 43 U.S.C. §1744(c), the relevant portion states that, "[t]he failure to file such instruments [records of location notice or certificate of the claim] as required by subsections (a) and (b) of this section shall be deemed *conclusively* to constitute abandonment of the mining claim or mill or tunnel site by the owner" (emphasis added).

> While we will not allow a literal reading of the statute to produce a result "demonstrably at odds with the intentions of its drafters," . . . with respect to filing deadlines a *literal reading of a statute* is generally the only proper reading of those words. To attempt to decide whether some date other than the one set out in the statute is the date actually "intended" by Congress is to set sail on an aimless journey, for the purpose of a filing deadline would be just as well served by nearly any date a court might choose as by the date Congress has in fact set out in the statute. . . . Deference to the supremacy of the legislature, as well as recognition that congressmen typically vote on the language of a bill, generally

---

[77] *Locke*, 471 U.S. at 90.

[78] *Id.* at 89, n.7. Justice Marshall also acknowledged that earlier pamphlets published and distributed by the Bureau also stated that the annual filings had to be made "on or before December 31" but was subsequently "corrected" in order "to bring the pamphlet into accord with the [Bureau's] regulations." *Id.*

[79] *Id.* at 93.

[80] *Id.* at 96.

[81] *Id.* at 95.

[82] *Id.*

> require us to assume that the legislative purpose is expressed by the ordinary meaning of the words used. . . The phrase "prior to" may be clumsy, but *its meaning is clear*.[83]

In his vigorous dissent, Justice Stevens pointed out what he considered to be a drafting error in the language of the statute.[84] In his examination of the program and regulations promulgated under FLPMA, Justice Stevens concluded that because the statute required annual filings to preserve the mining claim, it would consequently be anomalous to hold that the annual registration would have to take place before the last day of the calendar year, December 31.[85] He did not dispute that the plain meaning approach is not an effective means of interpreting legal texts. Rather, he argued that where there is ambiguity—as demonstrated by the various interpretations given the text by the Bureau in its pamphlets and regulations,[86] the language is not clear or unambiguous; consequently, the precedent conditions needed to apply the plain meaning approach did not exist. As Justice Stevens points out, the regulations and other interpretations given by the Bureau demonstrate that the meaning of the statute "is not all that obvious,"[87] but if it were, "it is doubtful that the Bureau would have found it necessary to change the language at all."[88] Reminiscent of Scrooge's "Bah, humbug," Justice Stevens expressed his understandable disgust with the protest, " 'Plain language,' indeed."[89]

---

[83] *Id.* at 93, 95, 96 (citations omitted, emphasis added). An interesting aside about this case is that it demonstrates that some judges are not wedded to any particular method of interpreting legal texts. Compare and contrast the plain meaning method used here by Justice Marshall and his concurrence in the Brennan opinion in *United Steelworkers of America v. Weber*, 443 U.S. 193, 197-209 (1979) (Marshall, J., concurring) which eschews literalism and plain meaning.

[84] *Id.* at 118-19 (Stevens, J., dissenting).

[85] Justice Stevens continued by stating,

> That [the statutory text] was in fact an error seems rather clear to me because no one has suggested any rational basis for omitting just one day from the period in which an annual filing may be made, and I would not presume that Congress deliberately created a trap for the unwary by such an omission. . . . I have no doubt that Congress would have chosen to adopt a construction of the statute that filing take place by the end of the calendar year if its attention had been focused on this precise issue.

Id. at 123, 125.

[86] As Justice Stevens noted, the "mail box" regulation promulgated by the Department of the Interior allowed a claimant to meet the requirements of the statute if one mailed the necessary documents which were then received no later than January 19 of the following year. *Id.* at 121 (Stevens, J., dissenting).

Another significant exercise in the evaluation of plain meaning interpretation is found in the 1978 snail darter case of *TVA v. Hill*.[90] In this case, the Supreme Court was called upon to resolve the meaning of section 7 of the Endangered Species Act of 1973, 16 U.S.C. § 1536. The substance of this section mandated that once the Secretary of the Interior had designated a life form species as endangered [as he did with the snail darter], all Federal government agencies must exercise their activities in such a way as "not to jeopardize the continued existence of such endangered species . . . or result in the destruction or modification of habitat" of the endangered species.[91] In this case, Tennessee Valley Authority, the agency involved, had essentially completed a construction of a dam on the Tellico River which posed a threat to the habitat and, therefore, the survival of the snail darter.[92] Writing for the majority, Chief Justice Burger essentially relied on a plain meaning interpretation of section 7 and found that the Endangered Species Act necessitated the cessation of the Tellico Dam project regardless of the cost.[93] As earlier noted, the plain meaning rule is inviolable for many interpreters unless the plain or ordinary meaning leads to absurd results or impractical consequences. And, indeed that was the challenge presented by Justice Powell in his dissent.

He asserted that the majority's interpretation and application of section 7 did produce an absurd result in view of the fact that the dam had been completed not out of Congressional ignorance but with Congressional knowledge and approval.[94] He demonstrated that Congress intended to go ahead with the dam notwithstanding the provisions of section 7 of the Endangered Species Act because it had continuously legislated and appropriated funds for this dam since 1966.[95] But even after the Secretary had made his finding about the snail darter in 1975, Congress annually continued its support of the Tellico Dam with knowledge of the Secretary's declaration.[96] As Justice Powell pointed out, "Congress, with full knowledge of the Tellico Project's effect on the snail darter and the alleged violation of the [Act], continued to appropriate money for the completion of the Project."[97] His conclusion was reinforced by the fact that the Appropriations Committee argued that the statute did not prohibit the dam's completion, "a view that Congress presumably accepted in approving the appropriations each year."[98] By demonstrating Congressional knowledge and other legislative action that also had an impact on the meaning of Section 7 as it applied to the Tellico Dam Project, Justice Powell relied on other authoritative legislative texts, especially the annual funding legislation for the Tellico Dam project, to discern the meaning of Section 7. In essence, he relied on a type of approach known as textualism to which I now turn.

---

[87] *Id.* (Stevens, J., dissenting).

[88] *Id.* at 122 (Stevens, J., dissenting).

[89] *Id.* (Stevens, J., dissenting).

[90] 437 U.S. 153 (1978).

[91] *Hill*, 437 U.S. at 153.

[92] *Id.* at 159-60.

[93] *Id.* at 184.

(2) Relating the Principal Text to Other Related Texts

Related to, but distinguishable from, the "plain meaning" rule is the interpretive concept which some label as textualism.[99] The similarity I draw between "plain meaning" and "textualism" is that both of these methods of interpretation look exclusively at legal texts and avoid investigation of and reliance on interpretive guides found outside of the text. A notable exception would be the reliance on dictionaries to ascertain the common usage of essential words contained in the legal text.[100] The distinction I make between the plain meaning and textual methods is that the interpreter who relies on the "plain meaning" approach will tend to restrict the analysis to that specific language which deals with the precise issue that comprises the heart of the controversy. The interpreter who employs the "textualist" method will look at and consult other related legal texts such as the entire statute (rather than just the portion which is the subject of litigation); moreover, the textualist may examine the entire statute and its relationship to other legal texts promulgated by the same legislative authority dealing with an equivalent kind of factual issue.[101]

---

[94] *Id.* at 196 (Powell, J., dissenting).

[95] *Id.* at 197 (Powell, J., dissenting).

[96] *Id.* at 197-98, 200 (Powell, J., dissenting).

[97] *Id.* at 200 (Powell, J., dissenting).

[98] *Id.* (Powell, J., dissenting).

[99] See SCALIA, *supra* note 9, at 23, where the author explains that, "[t]extualism should not be confused with so-called strict constructionalism, a degraded form of textualism that brings the whole philosophy into disrepute . . . . A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to contain all that it fairly means." The Justice

The textualist examines not only the specific language in the section of a legal text dealing with the issue at hand, but the entire statute (in the case of a programmatic statute) or other legislation enacted by the same legislature which pertains to this subject matter or to the entire constitution.[102]

---

continues by arguing that "in textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation—though not an interpretation that the language will not bear." *Id.* at 37.

[100] For example, in *Smith v. United States,* 508 U.S. 223, 228-29, 242 (1993) (definition of use) and *McBoyle v. United States*, 43 F.2d 273, 274 (10th Cir. 1930) (definition of "motor vehicle"), judges turn to dictionaries for help in determining what is the plain or ordinary meaning of important words in the text that is being interpreted. *But see* Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71 (1994).

[101] *See* Antonin Scalia, *Judicial Deference To Administrative Interpretations Of Law*, 1989 DUKE L.J. 511, 521; *see also* Bowen v. Massachusetts, 108 S. Ct. 2722, 2742 (1988) (Scalia, J., dissenting); Frank Easterbrook, *Statutes' Domains,* 50 U. CHI. L. REV. 533, 544-51 (1983); Cass Sunstein, *Interpreting Statutes In The Regulatory State*, 103 HARV. L. REV. 405, 415-16 n.29 (1989).

[102] Judge Wald of the District of Columbia Circuit served as legislative counsel at the Department of Justice prior to her appointment to the bench. She emphasizes that we cannot assume too much about what Congress knows and recalls about other legal texts it has enacted that deal with the same subject matter as the statute that is at the center of the current interpretation. Both members of

Another way of looking at the textualist approach is to say that the interpreter is concerned with the complete fabric of the text, i.e., the entire body of law that relates to the issue under consideration.

It is possible that the textualist may encounter conflict between and among distinct legal texts (and their respective interpretations by the same court) that are relevant to the same or similar substantive issues.[103] However, the textualist is prepared to deal with and resolve as best one can these conflicts, but only within the realm of the legal texts; one will not go beyond the universe of legal texts to resolve any internal conflict or ambiguity [with the exception of dictionary consultation]. In doing so, the interpreter may also encounter contrary opinions among judges about how the same language is interpreted.[104] An additional concern surfaces when it appears that

---

Congress, and their staffs, do not have the best record of considering what they have done in the past or considering how one Congress relates (if it does this at all) its current work to that of a previous Congress. *See* Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 213 (1983).

[103] *E.g.* in *Guardians' Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 606-7 (1983), the Supreme Court interpreted the anti-discrimination language of Title VI of the Civil Rights Act of 1964 to apply only to intentional discrimination against private plaintiffs. The petitioners in this case were African-American and Latin police officers who alleged discrimination under a "last-hired-first-fired" policy used to lay off police personnel. The petitioner-officers were late hires because of their lower scores on the entry level examination. Under the rules of this testing, appointments to the police force were made on the basis of selecting candidates with the highest scores. Consequently, those applicants with lower scores had less seniority than those with higher scores. The Court affirmed the court of appeals which held that proof of discriminatory intent was needed to maintain a Title VI challenge to this policy. However, two years later in *Alexander v. Choate*, 469 U.S. 287, 294-99 (1985), the Court seemed more willing to apply section 504 of the Rehabilitation Act of 1973 (which prohibits discrimination against or exclusion of qualified handicapped person from any program or activity receiving Federal financial assistance) to any incident of discrimination, intentional or unintentional. In *Choate*, a unanimous Court found that Congress viewed discrimination not as a calculated act but, rather, as "thoughtlessness and indifference—of benign neglect." *Choate*, 469 U.S. at 295. The Court illustrated this point by using the example of architectural barriers on sidewalks and in buildings which inhibit the mobility and access of some handicapped people. *Id.* at 297.

[104] *See, e.g.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In *Bakke* the Justices were in conflict about whether Title VI of the Civil Rights Act

there was a mistake, which seems to be the case in *Locke*, in drafting the text. However, the norms of textualism prohibit the interpreter from going beyond statutory or other authoritative texts to arrive at the best meaning of the text.[105] It is also possible that different government agencies may hold incongruent views about the same programmatic statute which they are mutually responsible for enforcing. An example involving the Federal Coal Mine Health and Safety Act of 1969 (the 1969 Act)[106] will illustrate this point.

After the 1968 Farmington Coal Mine disaster which claimed the lives of many workers, Congress conducted investigative hearings to examine the status given health and safety concerns in the domestic coal mining industry.[107] The consensus was that a comprehensive program designed to protect and promote worker health and safety was long overdue.[108] The

---

of 1964 gives an individual a private cause of action. Justice White held the view that it did not. *Id.* at 380-81. Justice Powell sidesteps the issue. *Id.* at 283. Justices Brennan, Marshall, and Blackmun adopted the Powell approach to this issue. *Id.* at 328. Justice Stevens, along with Chief Justice Burger and Justices Stewart and Rehnquist held the view that Title VI can be enforced in a private lawsuit. *Id.* at 418-21. An insightful examination of texualist methodologies has been provided by Muriel Morisey Spence, *The Sleeping Giant: Textualism as Power Struggle*, 67 S. CAL. L. REV. 585 (1994), where the author points out that the refusal of textualist judges to rely on legislative history demonstrates a "power struggle" between Congress and the judiciary. Spence argues that Congress should expect courts to rely on legislative history because it is "an integral part of how Congress chooses to exercise its constitutionally mandated role." *Id.* at 588. *But see* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995) (identifying important and subtle contributions textualism makes to enterprise of judicially determining what normative legal texts mean).

[105] *See, e.g.*, Recent Case, *Statutory Construction—Drafting Errors—D.C. Circuit Declares Section 92 of the National Bank Act Invalid*—Independent Insurance Agents of America, Inc. v. Clarke, 955 F.2d 731 (D.C. Cir. 1992), 105 HARV. L. REV. 2116 (1992) (addressing problem created by failure of textualism to consider powerful evidence extending beyond statutory texts to determine meaning of statute plagued by acknowledged drafting error).

[106] 30 U.S.C. §§ 801-960 (1969).

[107] *See* KEN HECHLER, *Enforcement Provisions of the 1969 Federal Coal Mine Health and Safety Act—an Introduction: The Development of the Federal Coal Mine Health and Safety Act Of 1969*, 77 W. VA. L. REV. 613, 614 (1975). Mr. Hechler was a member of Congress from the Fourth District of West Virginia and played an important role in the development and passage of the 1969 Act.

[108] *See* Congressional findings in section 1 of the Federal Coal Mine Health

programmatic statute that ensued was signed into law by the President on December 30, 1969.[109] The 1969 Act contained interim mandatory health and safety standards. Among the health standards were provisions for controlling respirable coal mine dust which, after being inhaled by workers over a long period, can cause coal workers' pneumoconiosis (more commonly known as black lung disease).[110] The 1969 Act also contained a benefits program for compensating worker-victims who were totally disabled due to black lung disease or specified survivors of the miners who died from this disease.[111]

Initially, the Secretary of the Interior was responsible for administering the mandatory health and safety provisions, and the Social Security Administration was delegated the responsibility of overseeing the black lung compensation program. However, in 1977, Congress amended the 1969 Act and transferred the Interior Secretary's enforcement duties to the Secretary of Labor.[112] Most of the existing and prospective responsibilities for administering the black lung benefits program were also transferred to the Secretary of Labor.[113] The Labor Secretary authorized the Mine Safety and Health Administration (MSHA) to enforce the health and safety scheme and delegated to the Office of Workers' Compensation Programs (OWCP) the management of the black lung compensation program.[114]

Even though the 1977 legislation was enacted in two separate amendments, the original provisions were rooted in the same 1969 Act. The 1977 amendments are like fraternal twins;

---

and Safety Act of 1969, 30 U.S.C. § 801.

[109] PUB. PAPERS OF RICHARD M. NIXON at 1046 [502]. When he signed the legislation into law, President Nixon commented on his reservations about Title IV. *Id.* He felt that responsibility for running the programs for compensating miners with black lung disease belonged to the states. *Id.* However, he also felt that due to the mandatory health provisions of the 1969 Act, Federal responsibility would expire in seven years. *Id.* It did not. *Id.*

[110] 30 U.S.C. §842 (1969).

[111] 30 U.S.C. §§901-902 (1969).

[112] Pub. L. No. 95-164, 91 Stat. 1290 (1977).

[113] Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1977).

[114] 29 U.S.C. § 557a (1982).

not only are they closely related but they were also conceived simultaneously by the same Congress after the 1968 Farmington disaster. This close relationship between concerns about safety and health eventually focused in one agency. The Secretary of Labor was consequently entrusted with most of the responsibilities of enforcing the 1969 Act as amended in 1977.

From 1974 to 1979, as a member of the Office of the Solicitor of the United States Department of the Interior, I represented the Secretary in administrative hearings concerning different aspects of the enforcement of the 1969 Act. From 1979 to 1982, I was a member of the corporate legal staff of a diversified energy company which owned and operated coal mines subject to the provisions of the health and safety and black lung benefits programs of the 1969 Act. I represented my corporate client in cases involving both the health and safety standards as well as those concerning black lung compensation. Along with many other members of the legal community who were involved with the different components of this important remedial legislation, I developed an appreciation for the inextricable relationship between the health standards enforced by MSHA regarding the control of respirable dust and the black lung benefits program administered by OWCP.

Around 1980, my corporate client received a black lung benefits claim filed by one of its former employees who worked for her entire career in an office. The manager of workers' compensation (who initially reviewed black lung claims filed against the mining division) questioned whether an office worker was a "coal miner" entitled to benefits under the legislation. At the time, benefits would usually be awarded by OWCP if the claimant met certain medical presumptions, or if the claimant proved in an administrative hearing that he was totally disabled due to black lung caused during his employment.

The term *coal miner* is defined twice in the 1969 Act, once under the health and safety provisions[115] and then under the black lung benefits provision of Subchapter IV.[116] While the reasonable lay interpreter might conclude that an office worker is not a coal miner, any employee of a coal company might be considered a coal miner if that individual regularly went into areas (either underground or on the surface) where one was exposed to and inhaled respirable dust.[117] The Seventh Circuit Court of Appeals concluded that a clerical worker, who can demonstrate a regular exposure to respirable dust, would be considered a coal miner, and thus would be eligible for black lung benefits if the necessary medical criteria were met.[118]

---

[115] 30 U.S.C. § 802(g) (defining "miner" as "any individual working in a coal or other mine.").

[116] 30 U.S.C. § 902(d) (defining "miner" as "any individual who works or has

Once a claim is received by an operator (the employer of the "coal miner"), it is entitled to develop its own evidence to determine whether it will pay or contest the claim.[119] In assessing the merits of this claim, I determined that it would be useful to see if this particular claimant, in her own particular history of employment, was ever monitored for exposure to respirable dust as required by the 1969 Act as amended.[120] Under applicable regulations, MSHA is responsible for periodically receiving and evaluating the levels of respirable dust to which coal miners are exposed.[121]

Under the relevant discovery provisions for black lung claims,[122] I requested from MSHA all records regarding any respirable dust samples taken from the working environment of the clerical worker who had filed the benefits claim. MSHA did not consider the work performed by this particular clerical worker to be that of a coal miner. Consequently, MSHA did not

---

worked in or around a coal mine preparation facility in the extraction or preparation of coal.").

[117] *See* 30 U.S.C. § 802(h)(1) and (2) (describing areas in which "coal miners" ordinarily work and where they would be exposed to inhaling respirable dust). "Respirable dust" is defined under the underground health standards as "dust collected by a sampling device approved by the Secretary . . . in accordance with Part 74 (Coal Mine Dust Personal Sampler Units) of this Title . . . ." *See* 30 C.F.R. §70.2(n) (1998). The same definition is given in the surface mine health standards. *See* 30 C.F.R. § 71.2(k) (1998).

[118] *See* Adelsberger v. Matthews, 543 F.2d 82 (7th Cir. 1976).

[119] 20 C.F.R. § 725.414 (1998).

[120] 30 U.S.C. § 814(f) (1998).

[121] *See generally* 30 C.F.R. Part 70, Subparts B and C (1998); 30 C.F.R. Part 71, Subparts B and C (1998).

[122] 20 C.F.R. Part 725, Subpart E (1998).

require any periodic respirable dust sampling of her work environment, and it had no records regarding this worker or her working environment.

When I submitted the correspondence I received from MSHA to OWCP, the OWCP deputy commissioner reviewing the case questioned its relevance. I told him it was evidence to rebut the allegation that the office worker worked in an environment in which she was regularly exposed to unhealthy levels of respirable dust. In essence, I wanted to demonstrate that this claimant was not a "coal miner" under the black lung benefits program. Although this particular case was disposed of on other grounds, the deputy commissioner indicated he would challenge my claim that the claimant was not a coal miner and would also challenge the admissibility of the MSHA correspondence I proposed to introduce into evidence to support my client's defense.

The relevance of this history to interpreting legal texts is this: one division of the same cabinet office responsible for enforcing substantively related subparts of the same programmatic statute dealing with the prevention and compensation of the same occupational disease did not recognize the relationship of those portions of the health and safety legislation dealing with respirable dust, its control, and compensation for an occupational disease caused by regular exposure to this dust. It seemed that OWCP wanted to place the related subparts of the 1969 Act dealing with the prevention of the disease and the compensation of black lung disease in hermetically sealed compartments in which the provisions of the health standards would never come in contact with the related black lung benefits provisions.[123] My approach to these two related subparts apparently conflicted with that taken by the deputy commissioner. In retrospect, I took a textualist approach to finding the meaning of the legislation. It was important to relate those provisions dealing with control of the work environment promulgated to arrest occupational health problems with those provisions dealing with the awarding of benefits for the same health concerns that became a totally disabling disease.

---

[123] One commentator has suggested that a reason why OWCP approved a large numbers of claims was because it was under Congressional pressure "that more claims be paid." *See* MARK SOLOMON, *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. VA. L. REV. 869, 915 (1981).

In essence, my client viewed the two subparts as being part of a statutory seamless garment. It made abundant sense to relate information gathered from an enforcement scheme designed to prevent an occupational disease to a hearing that would determine whether a worker had contracted the very same disease that would be compensated under the provisions of the benefits scheme. The facts concerning exposure (or *no exposure*) to respirable dust were relevant both to the enforcement program which exists to reduce, if not eliminate, the conditions that cause an occupational disease and to the compensation program that provides benefits to those workers totally disabled by the same disease.[124]

Let me now illustrate the distinction between different conclusions which may be reached by a plain meaning interpreter and a textualist by using the earlier hypothetical ordinance prohibiting motor vehicles from the town park. I begin with the example of the young motorist who drove his car through the park "for kicks." I think that both the plain meaning interpreter and the textualist would conclude that there is no ambiguity in applying the statute to the original facts which served as the catalyst for passage of the ordinance because a family automobile is a motor vehicle and it was an automobile that was driven into the park premises. The action of the novice motorist falls within the conventional meaning and application of the statute: automobiles are motor vehicles, and are, therefore, prohibited from the park premises. By conventional understanding, reasonable people who comprise the community of citizens which enacted this ordinance should more likely than not agree that the youth's car is a motor vehicle covered by the ordinance. These people form an "interpretive community" that is concerned with the meaning of this important text.[125]

---

[124] The view held by Frank Grad about the scope of programmatic statutes seems to offer support to my textual approach to relate the health standards of the 1969 Act to the statute's workers' compensation program. As Grad argued:

> Whenever a question arises of the proper interpretation of the [programmatic] statute in a particular case, that interpretation should be preferred which advances the program established by the legislature *as a whole*. . . . The emphasis should be on the advancement of the program *as a whole*, and not eking out evidence of specific intent relating to the application of one of its subsidiary provisions.

Grad, *supra* note 43, at 258 (emphasis added).

The notion of interpretive communities shall become more apparent when we concentrate our attention to the meaning we give to words and phrases encountered in daily life and in the context of the groups (i.e., different interpretive communities) to which we belong. The family, the office, the factory, the school and the religious group all form their own interpretive communities. I have come across an example in my own daily routine which illustrates how the groups we belong to form the nuclei of interpretive communities. In addition to being a lawyer and teacher of the law, I am also a Catholic priest. Since my ordination into the priesthood, I have been asked by many of my students and alumni to do their weddings. Often times the request is expressed in words like, "Will you marry me?" or "Will you marry us?" Now, how would a person listening to this conversation react? If the listener knew that I am a clergyman authorized by the Roman Catholic Church and the civil jurisdiction to perform the service uniting a man and woman in matrimony, that individual would most likely construe that I was asked to officiate at this wedding. A person outside of this community, who is unfamiliar with my several personae or who might have seen me dressed in civilian clothes, would probably wonder about the unusual meaning of this statement. However, if this outsider had seen me dressed in clerical attire or liturgical vestments, then that interpreter might well have reached the understanding that I would officiate at the wedding ceremony. In short, the meaning given words is often molded by different communities of interpreters. The meaning depends on conventions of language and contexts to which the persons forming the community subscribe.[126]

---

[125] *See* OWEN M. FISS, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982):

> The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the [interpreter], but only that it be constrained. To explain the source of constraint in the law, it is necessary to introduce two further concepts: One is the idea of disciplining rules, which constrain the interpreter and constitute the standards by which the correctness of the interpretation is to be judged; the other is the idea of an interpretive community, which recognizes these rules as authoritative. The idea of objective interpretation accommodates the creative role of the reader. It recognizes that the meaning of a text does not reside in the text . . . it recognizes a role for the subjective. . . . At the same time, the freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material (e.g., words, history, intention, consequence), as well as those that define basic concepts and that established the procedural circumstances under which the interpretation must occur.

See also Kenneth S. Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 RUTGERS L. REV. 676 (1979). Fiss elaborates beyond the scope of defining what is textualism. However, I believe that there is a parallel between his thesis and the point that both plain meaning interpreters and textualists each belong to an interpretive community whose respective rules attach a great deal of significance to the words of the statute.

Textualists will often differ with plain meaning interpreters when the interpretive exercise looks at other circumstances that are related to the basic incident. In my hypothetical involving the park ordinance, the driving of the motorized wheelchair into the park is the catalyst which has triggered the application of the ordinance. Recall that the senior citizen who drove her motorized wheelchair through the park was aware of the ordinance, but did not think her action constituted a violation of the ordinance. By contrast, the police officer who cited her regarded the operation of the motorized wheelchair in the park as an activity prohibited by the statute. Each was aware of the statute, yet each had a different conclusion about the kinds of activity it prohibited.

---

[126] *See* Gerald C. MacCallum, Jr., *Legislative Intent*, 75 YALE L.J. 754 (1966). MacCallum aptly suggests that for the interpreter, as well as the legislator, "practical understanding of . . . language" is based on "a grasp of the linguistic conventions utilized, rather than a grasp of his specific purposes in enacting the statute." *Id.* at 761.

Suppose that the reason why the motorized wheelchair operator reached a different conclusion was that she also thought about and applied other relevant legal texts to her circumstances. Assume that the jurisdiction also has a statute which defines *motor vehicle* as "any self-propelled rubber-tired equipment using four or more wheels to convey one human being, cargo, or both; or, any self-propelled rubber-tired equipment using two wheels and a self-contained power plant generating at least ten horsepower to convey human beings, cargo, or both." The motorized wheelchair operator can reasonably, and I think persuasively, argue that she was not in violation of the ordinance because another relevant statute defines "motor vehicles" and her motorized wheelchair most likely does not fall within the definition.[127] Her motorized wheelchair, although a rubber-tired four wheel piece of equipment that can and did transport her, is not a motor vehicle because the engine propelling the motorized wheelchair was less than one horsepower and not designed for transporting more than one person or cargo. Its specified function is to make mobile one human being who is incapable of moving herself. Since her motorized wheelchair does not fall within the class of self-propelled rubber-tired conveyances covered by the definition, she did not violate the statute. The act of riding her motorized wheelchair through the park does not seem to be covered by the ordinance once the definition of motor vehicle is clear.

Other applications of textualism are found in two decisions written by a couple of America's most discerning judges, Learned Hand and Benjamin Cardozo. In *Helvering v. Gregory*,[128] Judge Hand warned about looking too closely at only one textual passage that seems to be dispositive of an issue. He said, "[T]he meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which *all* appear, and which *all* collectively create."[129]

---

[127] Would a three-wheeled all-terrain-vehicle having a five-horse-power engine be a motor vehicle under this definition?

[128] 69 F.2d 809 (2d Cir. 1942).

In his dissenting opinion in *Panama Refining Co. v. Ryan*,[130] Justice Cardozo warned that the meaning of a statute cannot simply be entrusted to a narrow section that seems to address the legal issues involved in a particular case when he said, "[T]he meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."[131] By keeping in mind all relevant texts when pursuing the search for meaning, we still realize that we know virtually nothing about why the text was written. Did the authors consider certain language that was preferable to other language? If so, why the preference? To answer these kinds of questions, it is necessary to expand the horizon of the inquiry. Should we go beyond the texts themselves?

In 1993, the Supreme Court examined the meaning of the word "uses." In *Smith v. United States*,[132] the Court addressed whether a firearm traded in barter for drugs fell within the prohibition of the federal criminal statute making it an offense to use a firearm in this manner during and in relation to a drug trafficking offense.[133] The interpretative issue concerned whether the word "use(s)" means for any purpose or only for employment as a weapon. Justice O'Connor, writing for the majority, examined the plain meaning of the word "uses."[134] While she was satisfied that the term's ordinary meaning could include use of the gun for barter as well as a weapon, she further justified her decision upon textual analysis of other relevant statutes.[135] Noting that language "cannot be interpreted apart from context,"[136] i.e., a word's meaning which may be ambiguous becomes clear when "analyzed in light of the terms that surround it,"[137] she also looked at other related portions of the statute in order to clarify the meaning of "uses."[138] To the degree that there is ambiguity about the meaning of important language in a legal text, Justice O'Connor concluded that when section 924 is read together (i.e., a textualist approach), the meaning of "uses" becomes clear.[139] Her justification was based on the precedent that legal interpretation is a

---

[129] *Helvering*, 69 F.2d at 810-11 (emphasis added).

[130] 293 U.S. 388, 433 (1934) (Cardozo, J., dissenting).

[131] *Panama Refining Co.*, 293 U.S. at 439.

[132] 508 U.S. 223 (1993).

[133] 18 U.S.C. § 924(c)(1) (1998).

[134] *Smith*, 508 U.S. at 227.

[135] *Id.* at 228-30.

[136] *Id.* at 229. Justice Scalia, in his dissent, also mentioned the importance of

> holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.[140]

For the majority, the meaning of the word "uses" became clear when read in the context of the whole section of the statute.[141]

The Court had the opportunity to reexamine the meaning of "uses" two years later in two companion cases involving alleged violations of section 924(c)(1). In *Bailey v. United States* and *Robinson v. United States*[142] a unanimous Supreme Court, with Justice O'Connor again writing the opinion, concluded that neither defendant had "used" a firearm in the commission of a drug trafficking offense.[143] In Bailey's case, the

---

the textual context in which the term whose meaning is the subject of dispute is used. *Id.* at 241 (Scalia, J., dissenting). Justice Scalia emphasized, however, the literary context in which the term is employed to convey meaning that accords to its common understanding. *Id.* at 243-44 (Scalia, J., dissenting). Thus, for him, the meaning of the disputed term must be understood in a context of a "crime of violence" and "drug trafficking crime" which implies usage as a weapon, not as a means of barter. *Id.* at 246 (Scalia, J., dissenting).

[137] *Id.* at 229.

[138] *Id.* at 233-35.

[139] *Id.* at 233.

[140] *Id.* at 233-34 (quoting United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988)).

[141] *Id.* at 234-35.

[142] 516 U.S. 137 (1995).

[143] *Bailey*, 516 U.S. at 139.

drugs were found inside the passenger compartment of the car with him when he was arrested; however, the loaded firearm was found locked in the trunk of the same car.[144] In Robinson's case, her firearm was discovered in a locked trunk located in her apartment, which was discovered after a search pursuant to a warrant.[145] Justice O'Connor discussed the issue of context and the meaning of the word "uses."[146] However, it was important to the entire Court that the term "uses" "requires evidence sufficient to show an active employment of the firearm by the defendant," a use that makes the weapon an "operative factor" in relation to the drug trafficking offense.[147] Apparently, even Justice Scalia was satisfied that the term "uses" indicates "an active meaning of the term" and there was no active employment of Bailey's nor Robinson's weapon.[148]

Another interesting case relying on textualist interpretation is from Canada. In *Regina v. Keegstra*,[149] the defendant, a teacher, was convicted of violating section 319(2) of the Criminal Code for unlawfully promoting hatred against Jews. However, the Alberta Court of Appeal allowed the defendant's appeal,[150] and the Crown appealed to the Supreme Court of Canada. In allowing the Crown's appeal, the Court read together both the criminal statute, i.e., section 319(2) and the Canadian Charter of Rights which grants extensive, but not unlimited, freedom of expression. The majority of the Supreme Court found that section 319(2) constituted a reasonable limit on the broad guarantee of freedom of expression granted by the Charter.[151]

But even supporters of textualist approaches have noted that this approach can exclude other valuable and insightful evidence needed to understand the meaning of the text. For example, Richard Pierce has argued that while textualism has "great value," it precludes any reliance on other illuminating evidence, such as the intent of the author.[152]

---

[144] *Id.*
[145] *Id.* at 140.
[146] *Id.* at 143.
[147] *Id.*
[148] *Id.* at 148.
[149] [1990] 61 C.C.C.3d 1.
[150] [1988] 43 C.C.C.3d 150.
[151] *Id.*

(3) The Quest for (Original) Intent

Intentionalism raises a traditional interpretive question: what was the "intent of the drafter" in enacting the statute or other normative legal text?[153] This method concentrates on the search for "original intent"—what were the drafters thinking and why were they thinking this rather than something else when they wrote the text?[154] Intentionalism is a concept that has been, and continues to be, an interpretive issue over which legal commentators have debated for a better part of this century.[155] Views concerning the theory range from the supportive,[156] to those acknowledging that it is a fiction which

---

[152] Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacaphony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

[153] Sometimes the legislature mandates that courts construe the meaning of statutes in accordance with legislative intent. *See, e.g.*, OR. REV. STAT. § 174.020 (1995) (stating that "[i]n the construction of a statute the intention of the legislature is to be pursued if possible"). Judge Jack Landau of the Oregon Court of Appeals has raised in a fascinating essay the following question: what did the legislature "intend" by the mandate of construing, if possible, the statute in accordance with the "intention of the legislature"? *See* Jack L. Landau, *The Intended Meaning of "Legislative Intent" and Its Implications for Statutory Construction in Oregon*, 76 OR. L. REV. 47, 48 (1997). Judge Landau concludes that the meaning of "intention of the legislature" is not subjective, i.e., not according to what individual legislators thought, but non-subjective. *Id.* While not specifically offering what this means, Judge Landau demonstrates a variety of ways in which the Oregon state courts can discern what this means and suggests that the courts should choose one "for the construction of statutes is too important to be left to decision-making unsupported by a principled foundation." *Id.* at 110. Over three hundred years ago, Thomas Hobbes offered a similar thought: "But if by the letter [of the law] be meant the literal sense, then the letter and the sentence or intention of the law is all one. For the literal sense is that which the legislator intended should by the letter of the law be signified." THOMAS HOBBS, LEVIATHAN, 209 (Michael Oakeshott ed., Collier Books 13th ed. 1977) (1651).

[154] Fuller, *supra* note 2, at 700 (offering example of original intent). The author develops the following example of how the author of a normative text can misunderstand the importance of the drafter's [originator's] intent: "Someone says to me: 'Show the children a game.' I teach them gaming with dice and the other says, 'I did not mean that sort of game.' Must the exclusion of the game with dice have come before his mind when he gave me the order?" *Id.*

[155] In the Constitutional context, David Strauss questioned the usefulness of

---

originalist and textualist theories of interpretation. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 935 (1996). His preferred alternative is a common law approach which, unlike textualism or original intent, enables judges to make the text "fairer or more just." *Id.*

[156] *See* Daniel A. Farber & Philip Frickey, *Legislative Intent And Public Choice*, 74 VA. L. REV. 423, 424-27 (1988); MacCallum, *supra* note 126, at 756; Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case For a Modified Intentionalist Approach*, 63 TUL. L. REV. 1, 2 (1988). In a constitutional context, see Polly J. Price, *Term Limits on Original Intent? An Essay on Legal Debate and Historical Understanding*, 82 VA. L. REV. 493, 493-96 (1996). Price uses the case of *United States Term Limits v. Thornton*, 514 U.S. 729 (1995) to illustrate the argument supporting the need to obtain original intent. Price, *supra* at 493-96. Price's thesis is that when the constitutional text by itself does not answer the question about its meaning, and when the "original intent" is not apparent from the debates and contemporaneous writings of the authors, then "the behavior of the participants, after but sufficiently close to the fact, should be persuasive, because it might reflect the participants' understanding of what the federal Constitution permitted them to do." *Id.* at 496. In the context of the meaning of the Tenth Amendment and the question of whether this text permits or denies states to add additional qualifications for individuals seeking election to Congress, Price concludes that the history of the early nineteenth century demonstrates that those states which in fact did add further qualifications than those listed in Article I were permitted to do so. *Id.* at 496-97. Interestingly, Justice Scalia has offered support for the view taken by Price. SCALIA, *supra* note 9, at 37-41. While noting his rejection of the use of author's intent as a means of interpreting both the Constitution and statutes, Justice Scalia will consult the writings of those who were drafters of the Constitution [e.g., the authors of THE FEDERALIST PAPERS]. *Id.* He says he does so not because they were Framers and

> therefore their intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood. . . . What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsman intended.

Id. *See also* Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1628 (1997) (arguing that "the history that matters is not limited to Founding moments but must include subsequent developments as well."). Michael Dorf has recently raised some interesting and insightful points about the importance of *heroic* originalism in constitutional interpretation. *See* Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1770 (1997) (defining *heroic* originalism as concept which helps interpreter to understand and appreciate fact that Framers wrote Constitution out of "philosophy of limited government and the means they chose to implement it remain remarkably relevant to our current problems") (emphasis added).

still has limited use in legal interpretation,[157] to the skeptical.[158] A major scholarly controversy surrounding the issue of "legislative intent" or "author's intent" began with the exchange between Professors Max Radin and James Landis. Radin, a member of the so-called realist school, concluded that legislative intent is a fiction that has little, if any, bearing on the meaning of statutory law.[159] For him, it was the purest fiction to suggest that the members of a legislature (consisting of many people who hold different, sometimes conflicting views of legislative policy) share a common intent by enacting a legal text. Concerning the act of statutory interpretation, he stated,

> It has frequently been declared that the most approved method is to discover the intent of the legislator. Did the legislator in establishing this determinable have a series of pictures in mind, one of which was this particular determinate? On this transparent and absurd fiction it ought not to be necessary to dwell. . . . A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.[160]

These words of Radin were modified some dozen years later when he clarified his earlier views. While he did not retract his previous statements regarding the fiction surrounding legislative intent, he suggested that his statements about an interpreter's ability to discern the purpose underlying a particular statute may have been too broad.[161] In essence, Radin, while remaining skeptical about the fiction of "legislative intent," agreed that the words of the statute could reveal to the interpreter the purpose for which the statute was enacted as well as the means by which it could be implemented.[162]

---

[157] *See, e.g.,* Frank E. Horack, Jr., *The Disintegration of Statutory Construction,* 24 IND. L.J., 335, 340-41 (1949); Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Reexamination,* 9 CAL. W. L. REV. 128, 128 (1972); Charles B. Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence,* 20 B.U. L. REV. 601 (1940); *see also* Felix Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 538 (1947).

[158] *See, e.g.,* Scalia, *supra* note 101, at 517; *see also* L. H. LaRue, *Statutory Revision: Lord Coke Revisited,* 48 U. PITT. L. REV. 733, 752 (1987) (concluding that legal texts may have many "intents"). Most recently, Justice Scalia has branded the search for intent this way: "Government by unexpressed intent is tyranny." SCALIA, *supra* note 9, at 17.

[159] *See* Max Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863, 869-70 (1930).

[160] *Id.* at 869-70 (citations omitted).

Radin's theory, however, casts a shadow on the concept of representative democracy as we practice and experience it in the United States. So many of our political, economic, and social institutions operate only because there is a delegation from the whole to a smaller group. With this delegation comes authority (rarely *carte blanche* authority) that is still subject to the oversight and review of the whole. Thus, citizens (the whole) oversee the activities of Congress (the smaller group to whom power is delegated by the Constitution and by the vote). In turn, Congress (the whole) oversees the activities of committees, the smaller group to whom authority is delegated by internal rules that can be changed by Congress.

The gap between the views of Radin and Landis may not be as great as was originally thought.[163] Landis acknowledged:

> The real difficulty is not that the intent is irrelevant but that

---

[161] In responding to his earlier exchange with Landis, Radin submitted that:

> My statements were undoubtedly somewhat too sweeping. They suggested approval of the English method of dealing with debates, reports and the like, a method that regards these matters as incompetent as well as irrelevant. I intended then—and I certainly should like to take the position now—that they are neither irrelevant nor incompetent, but that they are in no sense controlling.

Max Radin, *A Short Way With Statutes*, 56 HARV. L. REV. 388, 410-11 (1942).

[162] *Id.* at 409.

[163] Sometimes the myth about a dispute lives a longer, more glorious life than the reality of any differences that may have originally caused the original disagreement. *See* MacCallum, *supra* note 126, at 754. Radin modified his criticism of the notion of legislative intent when he suggested that use of legislative history may have some competence and relevance in statutory interpretation, but that these materials are not controlling and do not demonstrate one fixed mind. *See* Radin, *supra* note 161, at 410-11.

> the intent is often undiscoverable, especially when the passer of legal texts is, in most cases, a representative assembly. Intent is unfortunately a confusing word, carrying within it both the teleological concept of purpose and the more immediate concept of meaning—the assumption that one or more determinates are embraced within a given determinable. . . . [I]ntent when used to mean purpose usually will be found to accompany the process of spurious interpretation, whereas intent when used as equivalent to meaning commonly accompanies the process of genuine interpretation, although . . . the distinction between these two processes is a nice one.[164]

Upon further reflection, it would appear that much of the energy spent on continuing the Radin/Landis disagreement could be better used to understand the social, political, or economic issues underlying the legal text and how the authors try to address them. Even though the members of the legislature or constitutional drafters may be at odds over the precise meaning of legal texts and the methods used to implement them, there is often considerably less dispute over the issues facing the authors and prompting them to respond by drafting and promulgating law. The history of the times surrounding the deliberation and drafting of the legal texts most assuredly has an impact on why people holding the legal authority to draft normative texts actually draft and promulgate them. Information concerning the authors' thoughts about whether and how they should respond to these surrounding circumstances can provide the subsequent interpreter with helpful insight about the meaning of the text.

With the fundamentals of the Radin/Landis debate in mind, let me return to the hypothetical ordinance once more. This time, I shall examine the position, if any, the enacting authority may have had toward the case in which paramedics enter the park with their ambulance to assist a person in need of emergency medical assistance. Can we, as an interpretive audience and community, support the claim that the legislators who promulgated the ordinance had any intent regarding the prospective interpretation and application of this statute? While there may be subtleties which could cloud the discussion, I think it both reasonable and fair to suggest that the legislative body did have some intent, both collectively as a unit and individually as specific members, regarding the regulation and prohibition of motor vehicles in the park. I further suggest that if the legislative authority were comprised of a group of individuals, a minority of whom did not want to exclude motor vehicles from the park, there was still some general agreement (i.e., intent) about the meaning of the ordinance they deliberated and enacted.

---

[164] James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 888 (1930).

Surely, the members of the town council, who served as the legislators, intended to deal with (or not deal with) the presence of motor vehicles in the park. It should also be fair to state at this point that there was probably no unanimity of opinion about the extent to which the presence of motor vehicles should be regulated. However, it is unequivocal that the legislative body was examining a statute controlling the presence of motor vehicles in the park and that each member of the legislative authority knew he or she was debating a proposed ordinance having bearing on the presence of and the need to exclude motor vehicles in the park.

We know from the earlier discussion, that a legislative authority previously defined the term "motor vehicle." But, did any member of the legislature intend to regulate the presence of emergency vehicles such as ambulances? Similarly, did any members of the legislature intend to exclude emergency vehicles from the proposed ordinance's coverage? Did any legislators intend to include emergency vehicles in the prohibition? Did the majority of the legislature share any views about the status of emergency vehicles under the proposed regulation?

Assuming that most reasonable people who subscribe to common disciplining rules and who are members of the same interpretive community[165] would agree that emergency assistance vehicles, such as ambulances, do not share the same status with privately-owned vehicles (which do not provide the community with important services such as police and fire protection or emergency medical care). Can we as interpreters agree that the legislature which enacted the motor vehicle ordinance *intended anything at all* regarding emergency vehicles like ambulances simply by looking at the text? Probably not, if neither this specific legal text nor any other statute enacted by the legislative body has addressed, mentioned, or identified emergency vehicles and conferred upon them any special status that would exclude them from coverage of regulatory statutes like the one in my park ordinance illustration. One way of textually addressing this would be through the enactment of a list of vehicles exempted from coverage.

---

[165] *See* Fiss, *supra* note 125, at 744.

Barring the existence of such a list, it would seem that an emergency vehicle is covered by the prohibition and ought to be excluded by the norms of the text. After all, most contemporary ambulances would fit within the first general definition of a motor vehicle, i.e., "any self-propelled rubber-tired equipment using four or more wheels to convey human beings."[166] Does this mean that the legislature had any particular intention regarding this important class of emergency vehicles which could surely have an important and substantive reason for being in the park while most other motor vehicles would not? But I must refrain from addressing the question at this stage.

While there may be skepticism about the existence of specific legislative intent(s),[167] an interpreter acts reasonably by assuming that the language of the statute does reflect some institutional intention on the part of the members of the legislature. After all, most interpreters begin with an examination of the text and ask the following question: What did the legislature, as a single institution, have in mind when it considered and passed this statute?[168] It would seem that even if the legislature did not have any general intent, either shared by its general membership or held by individual members, concerning the exclusion or inclusion of emergency vehicles, it would be useful to determine if legal texts such as the one under examination have a teleological dimension, i. e., a goal for which they were generally intended to reach and accomplish.[169]

---

[166] *See supra* notes 56-60 and accompanying text.

[167] *See* William R. Bishin, *The Law Finders: An Essay In Statutory Interpretation*, 38 S. CAL. L. REV. 1, 2 (1965).

[168] *See* Farber & Frickey, *supra* note 156, at 468-69.

I would like to suggest a caveat about intentionalism and the corresponding search of the interpreter for legislative intent. At the outset, it is imperative to realize that legislative intent is in part a legal fiction, albeit a useful one. Nevertheless, interpreters of legal texts must use this fiction carefully when we deal with legal texts (which are not fiction). Congress and other drafters enact legal texts which provide a general normative framework of guidelines and requirements that are to be observed by the citizens for whom the drafters promulgate law. Even the most detailed of legal texts cannot anticipate every potential circumstance to which it may some day be applied. By necessity, legal texts, in order to remain operational and effective, must be general and must retain flexibility in their language so they can deal, through the interpreter, with these unforeseen circumstances. It is our duty as advocates, administrators, and judges (for we are all interpreters) to appreciate the limits of any "intent" that was in the minds of those who drafted the legal texts (either institutionally or individually; either objectively or subjectively) when each text was enacted. It is significant to keep in mind that the intent of the authors may be an elusive query. After all, what may have been in the minds of the drafters may be extremely difficult to ascertain. It is also quite possible that they may have had nothing more on their mind than to enact a normative text dealing with some concern or issue confronting the community. On the other hand, the drafters may have expressed their intention, be it general or specific, in some way regarding the meaning of the text.

There are occasions, though, when judges are not prepared to depart from the text even when there is widespread agreement, even amongst the judiciary, that the legislature intended a different meaning. A case in point is *Chung Fook v. White.*[170] In *Chung Fook*, the Supreme Court was called upon to construe the meaning of section 22 of the Immigration Act of 1917.[171] Chung Fook was a native-born American citizen who wanted to bring his Chinese-national wife to the United States.[172] However, when the American-born husband sought her entrance into the United States, she was detained at an immigration facility because she was presumably infected with a contagious disease.[173] Chung Fook argued that section 22 of the Immigration Act provided a legal mechanism for her entry.[174] The pertinent provision relied upon stated that if the individual sending for the spouse "is naturalized," the immigrating non-national spouse "shall be admitted without detention for treatment in a hospital."[175] Of course, Chung Fook was a native-born citizen and not a naturalized citizen as stated in the statute. He contended that Congress did not intend to confer greater rights upon naturalized citizens than on native-born citizens.[176] So, if a naturalized citizen could bring his wife into the United States, then a native-born citizen must be able to do the same thing; to do otherwise would create two classes of citizens in which the naturalized would have greater rights than the native-born. While the Court was inclined to agree when it said that even though the statute may "unjustly discriminate[] against the native-born citizen, or is cruel and inhuman in its results," it still concluded that it was Congress's responsibility to remedy the injustice; the courts were called upon "to merely enforce the law as written, unless clearly unconstitutional."[177] So, even though there was a sensible argument about what Congress had intended in drafting and enacting the legislation, some courts will not stray from a plain meaning interpretation in spite of an acknowledged injustice.[178]

---

[169] *See* Maltz, *supra* note 156, at 13-14.

---

[170] 264 U.S. 443 (1924).

[171] *Chung Fook*, 264 U.S. at 444.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* at 444-45.

[176] *Id.* at 445.

[177] *Id.* at 446.

In the significant affirmative action case of *Regents of the University of California v. Bakke*,[179] Justice Powell, writing for the majority, examined and discussed Congress's "intent to halt federal funding of entities that violate a prohibition of racial discrimination."[180] An examination of *Bakke* reveals something relevant about the search for author's intent: it is easier to discern legislative intent the closer in time the interpretation is to the enactment of the statute. As time passes, the ability to identify something about the legislature's intent becomes increasingly difficult.

On the other hand, agencies which administer federal programmatic legal texts are generally, though not always, better equipped than many other interpreters to discern Congressional intent. The agencies ordinarily participate in the enactment of legislation by supplying expert information to the Congressional committees which consider, debate, and enact the bills that become law. Agencies, moreover, stay in touch with Congress regarding the legislation they interpret and implement via the appropriations and oversight powers reserved by Congress. Generally, agencies are sensitive to and mindful of legislative attitudes and intent about the meaning of legal texts enacted by the legislators. These unique contacts give the agency a good opportunity to keep track of the institutional pulse of Congress along with the "vital signs" of its committees and of individual members who are interested in the programs generated by the legal texts and administered by the agencies. In short, the agencies seem better suited than the courts to identify, appreciate, and understand Congress's general intent (or as

---

[178] *But see* Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 FORDHAM L. REV. 1611, 1612 (1997). Eisgruber argues that history plays an important and useful role in constitutional interpretation "only if history enlists in the service of justice." *Id.* Whatever occurred in the past is helpful only insofar as it is committed to "moral principle or justice." *Id.* at 1611.

[179] 438 U.S. 265 (1978).

[180] *Bakke*, 438 U.S. at 284.

Peter Strauss calls them, "views"[181]) about particular legislation. But those of us who are not as privileged as agencies might ask how we might better discern author's intention? An examination of the *Bakke* case should provide some assistance in this regard.

Bakke was one of the first cases to examine in detail the legislative intent underlying the Civil Rights Act of 1964.[182] In order to understand thoroughly the legislative intent of Title VI of the Civil Rights Act, it would helpful to examine it in the context of the case's factual background. In 1973, the Medical School of the University of California at Davis initiated an affirmative action admissions program to encourage and facilitate the application and enrollment of students from a pool of applicants who identified themselves as "disadvantaged."[183] When the medical school first opened in 1968, the entering class of fifty students had three Asian-American students but no African-American, Mexican-American, or Native-American students.[184] Subsequent to the medical school expanding the size of the class to one hundred students in 1971, the administration proposed an affirmative action program to increase the representation of "disadvantaged" students in each class.[185] Although no formal definition was ever given to the term "disadvantaged,"[186] applicants who were eventually accorded the status of being "disadvantaged" were designated by the faculty and administration of the school from non-white minority groups, viz. African-, Asian-, Mexican-,[187] and Native-American applicants.[188]

---

[181] *See* Strauss, *supra* note 43, at 438.

[182] 42 U.S.C. § 2000d (1994).

[183] *Bakke*, 438 U.S. at 272. The university never defined the term *disadvantaged*. *Id.* at 275 (emphasis added). However, the chairman of the special admissions committee which initially processed the applications of "disadvantaged" candidates considered factors demonstrating economic or educational deprivation. *Id.* In particular, the chairman would check for evidence regarding whether the candidate was granted a waiver of the application fee (based on an economic means test), whether the applicant had to work during college to support the applicant or the applicant's family, and whether the applicant was a member of a minority group. *Id.* at 274 n.4. Justice Powell concluded that the program for disadvantaged candidates was a *de facto* minority admissions program. *Id.* at 281 n.14.

[184] *Id.* at 272.

[185] *Id.*

[186] *Id.* at 274-75.

The medical school had two separate admissions committees. The first would process, evaluate, and judge the general admissions candidates who did not participate, or who were not permitted to participate,[189] in the special admissions program for "disadvantaged" students. The second committee handled only the minority applicants.[190] The application procedure was also bifurcated. Most applicants who did not qualify for the special admissions program were considered only for the eighty-four positions in the general admissions program. The minority applicants who qualified as "disadvantaged" candidates could be considered both in the general admissions program as well as in the special admissions program for the sixteen "disadvantaged" slots reserved for the incoming class.[191] Allan Bakke, a white male, twice applied for admission to the Davis medical school, first in 1973 and again in 1974.[192] Although he was found to be "a very desirable applicant" and had a strong benchmark score (the means by which applicants were evaluated by the admissions committee), he was rejected even though at the time of his rejection four of the special admissions slots had not yet been filled.[193] After this rejection, Bakke wrote to the chair of the admissions committee protesting that the special admissions program "operated as a racial and ethnic quota" to Bakke's detriment.[194]

In 1974, Bakke again submitted an application to the Davis medical school. While he was found to be a strong candidate by some members of the admissions committee and his benchmark score was again well above the median for the special admissions candidates who were accepted, the chair of the committee, with whom Bakke had previously corresponded, found the candidate to be "rather limited in his approach" to the concerns of the medical profession.[195] When Bakke was rejected for the second time, he filed a lawsuit in California state court. Bakke alleged that because the special admissions program operated in such a way as to exclude him on the basis of his race, it violated his rights under the Equal Protection Clause of the Fourteenth Amendment,[196] article I, § 21 of the California Constitution,[197] and Section 601 of Title VI of the Civil Rights Act of 1964.[198] Bakke sought mandatory injunctive relief and a declaratory judgment compelling his admission to the medical school.[199] The university cross-complained for a declaration that the medical school's special admissions program was a valid and lawful means of promoting members of disadvantaged groups to become doctors who could then serve patients who are members of the same disadvantaged groups.[200]

---

[187] *Id.* at 274-76. The record about this group is somewhat confusing. *Id.* Sometimes the members of this category were designated as Mexican-Americans. *Id.* This categorization would presumably exclude non-Mexican-American students whose language and cultural origin was not from Mexico but from some other part of the Latin world, i.e., Central and South America. In other instances, the record refers to Chicano students, etc. *Id.*

[188] *Id.* at 276.

[189] *Id.*

[190] *Id.* at 273-74.

[191] *Id.* at 275-76.

[192] *Id.* at 276.

[193] *Id.*

[194] *Id.*

The trial court found that the special admissions program operated as a racial quota, and it declared that the university could not take race into account in awarding positions in the entering class.[201] It held that the special admissions program violated both the Federal and State Constitutions and Title VI.[202] However, the trial court refused to grant Bakke the relief he requested because the court concluded that he had the burden to show that he would have been admitted to the medical school if the special admissions program did not exist.[203]

---

[195] *Id.* at 277.

[196] U.S. CONST. amend. XIV, § 1 states: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protections of the law."

[197] At the times pertinent to the litigation, this provision stated that: "No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. I § 21 (repealed 1974). Around the time of the Supreme Court litigation, this section was repealed and its provision was added to Art. I, §7 of the California Constitution. *Bakke*, 438 U.S. at 278, n.10.

[198] 42 U.S.C. § 2000d. "No person in the United States shall, on the ground of race, color, or national origin, be *excluded from* participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.* (emphasis added).

[199] *Bakke*, 438 U.S. at 277-78.

[200] *Id.* at 278.

Both parties appealed the trial court's decision. Bakke appealed on the grounds that the trial court denied him the relief he requested. The university's contention was that its special admissions program was lawful and that it should not be enjoined from benignly taking race into account in its admissions process.[204] While agreeing that the goal of the medical school to integrate the medical profession promoted a compelling state interest,[205] the Supreme Court of California found that the Equal Protection Clause of the Fourteenth Amendment mandated that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."[206] The California Supreme Court did not address the state constitutional or federal statutory issues raised by the parties.[207] Reversing in part the trial court, the state supreme court found that Bakke had been discriminated against on the basis of race, and the burden of proof then shifted to the university to demonstrate that Bakke would not have been admitted, even in the absence of the program for disadvantaged candidates.[208]

The state supreme court then remanded the case to the trial court to determine, under the corrected burden of proof, whether Bakke would have been admitted to either of the classes entering in 1973 or 1974 in the absence of the special admissions program.[209] Since the university conceded that it could not meet this newly allocated burden of proof, the state supreme court directed the trial court to enter judgment in favor of Bakke and to grant him the declaratory relief he sought.[210]

---

[201] *Id.* at 279

[202] *Id.*

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.* at 280.

[207] *Id.* at 279.

[208] *Id.* at 280.

The Supreme Court of the United States granted certiorari to review the Equal Protection issue.[211] Since the Court subsequently determined that it might be possible to avoid the constitutional issue,[212] and that the case might be disposed of on the Title VI issue originally raised by Bakke, it ordered supplementary briefing on the statutory issue.[213] A majority of the Court affirmed that part of the state court's decision finding the special admissions program unlawful and directing the university to admit Bakke because it had failed to meet its evidentiary burden of showing that he would not have been admitted even if there were no considerations for disadvantaged applicants.[214] The majority reversed that portion of the California court's decision which enjoined the university from giving any consideration to racial factors in its admissions procedure.[215]

In their separate opinion, Justices Brennan, White, Marshall, and Blackmun asserted that only those racial classifications that would violate the Equal Protection Clause of the Fourteenth Amendment (if employed by a state or its agencies) would be proscribed by Title VI.[216] In their estimation, Title VI would not preclude but would in fact permit race-conscious remedial action to eliminate discrimination against racial minorities.[217] In support of their contention, these justices conducted an extensive examination of the legislative history of the Civil Rights Act and of Title VI.[218] This group of Justices also concluded that the remedial admissions program used by the Davis medical school to compensate racial minorities for long-standing discrimination and to assist a small number of disadvantaged minority students was not unconstitutional.[219] The search for legislative intent comprised a core task of the Supreme Court in determining the meaning of Title VI.

---

[209] *Id.*

[210] *Id.* at 280-81.

[211] Regents of the Univ. of Cal. v. Bakke, 429 U.S. 1090 (1977).

[212] The Court referred to the concurring opinion of Justice Brandeis in Ashwander v. TVA, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Justice Brandeis catalogued earlier Supreme Court decisions providing rules for avoiding decisions that would involve constitutional issues. *Id.* at 346-48 (Brandeis, J., concurring).

[213] Regents of the Univ. of Cal. v. Bakke, 434 U.S. 900 (1977).

[214] *Bakke*, 438 U.S. at 271. Justice Powell wrote the majority opinion in which Chief Justice Burger and Justices Stewart, Rehnquist and Stevens concurred.

[215] *Id.* at 272. Justice Powell wrote the majority opinion in which Justices Brennan, White, Marshall and Blackmun concurred. *Id.*

[216] *Id.* at 354 (Brennan, J., concurring).

Through his examination of the text of Section 601 of Title VI, Justice Powell launched into a discussion about the "intent" of Congress underlying Title VI revealed by the statute's legislative history.[220] He remarked that, "[e]xamination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution."[221] While Justice Powell also relied on other methods of interpreting Title VI, he wasted no time in searching for a Congressional intent that might facilitate his task of interpreting the statute. He announced that the Court should "seek *whatever* aid is available in determining the precise meaning" of Title VI.[222] Upon researching some of this "voluminous legislative history," Justice Powell concluded that the "clear legislative intent" underlying Title VI proscribed only those racial classifications which would violate either the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment.[223]

Justice Powell also concluded that the special admissions program used by the Davis medical school twice violated

---

[217] *Id.* at 355 (Brennan, J., concurring).

[218] *Id.* at 328-55 (Brennan, J., concurring).

[219] *Id.* at 378.

[220] *Id.* at 284.

[221] *Id.*

[222] *Id.*

[223] *Id.* at 287. Justice Powell agreed in principle with Justices Brennan, White, Marshall, and Blackmun, that race *may* be a factor for consideration by the admissions committee; however, he asserted his disagreement with their method of how race could be considered. *Id.* at 296 n.36.

Bakke's Constitutional rights by denying him the equal protection guaranteed by the Fourteenth Amendment.[224] Justice Powell evaluated remarks made by the sponsors and other influential members of Congress who ushered the legislation through Congress to examine the underlying factors considered by Congress in passing the Act. His use of these remarks, however, was not for the purpose of illustrating the positive intent of Congress. Rather, his use of the legislative history was to demonstrate what Congress's intent was not.[225] Justice Powell stated that the statute required elimination of the long-standing discrimination suffered by African-Americans.[226] Thus, while "isolated remarks" of different legislators, including key architects and supporters, might lead the interpreter to the conclusion that Section 601 was designed to implement a colorblind scheme,[227] it was essential to Justice Powell for the interpreter to look beyond individual legislators' remarks to "determin[e] the precise meaning of the statute . . . ."[228] He concluded that "these comments must be read against the background of both the problem Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debate."[229]

After a rigorous analysis and synthesis of a "full examination of the legislative debate," Justice Powell recognized that Congress was attempting to offer redress to African-Americans who, for decades, had been the victims of racial discrimination in federally funded programs.[230] The legislative debates confirmed for Powell that race may be considered in administering federally funded programs as long as its consideration does not run afoul of the rights guaranteed to individuals under the

---

[224] *Id.* at 320.

[225] *Id.* at 284-85.

[226] *Id.* at 285-86.

[227] *Id.* at 284.

[228] *Id.*

[229] *Id.* at 285.

[230] *Id.* at 285-86. The Brennan opinion similarly construed portions of the legislative debate as exhibiting Congress's primary concern with the status of the African-American. *Id.* at 330 (Brennan, J., concurring).

Fifth Amendment and the Equal Protection clause of the Fourteenth Amendment.[231] Unlike Justice Brennan, Justice Powell did not agree that a "full examination of the legislative debates" would permit the Court to approve race considerations that infringed upon individual rights guaranteed by the Constitution.[232]

Like Justice Powell, Justice Brennan relied heavily on legislative history throughout its interpretation of Title VI. His opinion tied together legislative history with the intention of Congress. As with Powell, Brennan cited the same or similar elements of legislative history to support points paralleling those made by Justice Powell.[233] But in contrast to Powell, Brennan asserted stronger conclusions about the meaning of the legislative history. While Powell's use of legislative history was more guarded, Brennan argued time and again that it is "clear" from the legislative history or that the legislative history "compels" one finding over another, or that the legislative history "specifically" demonstrates a particular conclusion over all others.

At the outset, the Brennan opinion stressed that the legislative history, along with other subsequent Congressional and executive action and prior decisions of the Court, compelled the conclusion that the Civil Rights Act does not "bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment."[234] This is a point with which Justice Powell and Justice Stevens did not agree.[235]

---

[231] *Id.* at 296, 320.

[232] *Id.* at 287, 296, 320.

[233] *See id.* at 285-86; *id* at 330 (Brennan, J., concurring). Both of these opinions quote the same remarks made by Chairman Celler. *See also id.* at 286, 287; *id.* at 334-35, 338 (Brennan, J., concurring) (referencing to and quoting from same remarks made by Senator Humphrey).

[234] *Id.* at 328 (Brennan, J., concurring). I do not take issue with the conclusion; I do take issue with the method by which it is reached. The legislative history is anything but clear on this important point. Therefore, to suggest that it "compel[s]" such a conclusion, is a mistake.

[235] *Compare Bakke*, 438 U.S. at 296 n.36 *with Bakke*, 438 U.S. at 417-18

The foundation of Brennan's intentionalist approach appears early in the opinion where he referred to Rep. Emmanuel Celler (the Chair of the House Judiciary Committee and the floor manager of the Civil Rights Act in the House of Representatives) as personifying the "intent to provide. . .the means of assuring that [federal] funds were not used to subsidize racial discrimination."[236] The Brennan opinion explicated the intent expressed by Chairman Celler as being twofold: the first intention of the Congress was to establish the means of stopping the federal funding of racially segregated institutions.[237] The second prong was that only racial discrimination which violates the Fifth Amendment and the Equal Protection Clause of the Fourteenth is prohibited by Title VI.[238] Arguably, Brennan was preserving the Constitutional and statutory validity of federally-funded programs which racially discriminate in order to "remedy disadvantages cast on minorities by past racial prejudice."[239] The Brennan opinion reinforced this view by emphasizing that it was the intent of Congress "to assure that federal funds would only be spent in *accordance with constitutional standards*."[240]

At this stage, we should reflect on whether the legislative history relied on by the Brennan opinion is as "clear" or "compelling" about legislative intent as the opinion suggests. If some readers may think that I am critical of the goal the

---

(Stevens, J., concurring).

[236] *Id.* at 329.

[237] *Id.* at 330-31. The Brennan opinion references here a statement made by Chairman Celler. See also CHARLES WHALEN AND BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT (1985) for an in-depth discussion of the inferior economic, social, and political status of the African-American which was at the heart of the debate leading up to the passage of the Civil Rights Act of 1964.

[238] *Bakke*, 438 U.S. at 330.

[239] *Id.* at 325.

[240] *Id.* at 333 (emphasis added). Here the opinion references remarks made by "strong proponents" of the legislation preserved in the legislative history. Throughout the Brennan opinion, there are occasional references that it was *not* Congress's intent "to bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination." *Id.* at 340 n.17.

Brennan opinion was trying to reach, using benign racial classifications to redress past discrimination, I am not. I am critical, however, of the degree to which this opinion suggested that the legislative history was clear on the intent of Congress. The strength of the Brennan opinion is its identification of the problem Congress was trying to resolve when it enacted the Civil Rights Act of 1964. Its weakness is the degree to which it relied on legislative history in doing so. The Brennan opinion concluded its analysis with the assertion that, "[t]here is no justification for departing from [the] course [of eliminating discrimination against racial minorities] in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible."[241]

But if this judgment were so clear, why did Justice Powell[242] and the three Justices who joined Justice Stevens[243] fail to recognize what was so clear and endorse this contention of the Brennan opinion? Justice Stevens cited and persuasively used remarks made by the same key legislators upon which the Brennan opinion relied. For example, Justice Stevens quoted Chairman Celler and Senator Humphrey contending that Title VI was enacted to stop federal funding of segregated facilities, not to promote affirmative action programs.[244] The Brennan opinion cited the same or similar remarks to reinforce a different conclusion, viz, that federal funds were not to be used to subsidize racial discrimination inconsistent with Constitutional standards.[245]

Justice Stevens also cited the same key legislators to support his contention that legislative history reinforced the plain meaning of the statutory phrase "excluded from."[246] In other words, Justice Stevens argued that the legislative history fortified the interpretation that Title VI is color-blind, thereby supporting the conclusion that the remedial admissions program violated the statute. The Brennan opinion cited the same or similar remarks from the legislative history but for the quite different purpose of showing that the language of Section 601 does not create a color-blind standard but permits state action which may lawfully consider race.[247]

---

[241] *Id.* at 355.

[242] *Id.* at 296, 320.

[243] *Id.* at 413-14, 416, 418.

[244] *Id.* at 413 n.11.

[245] *Id.* at 330, 333.

[246] *Id.* at 414-15.

Another example illustrating that the legislative history is not the source of clarity that the Brennan opinion suggested is this: Justice Stevens quoted Senator Humphrey's definition of the term "discrimination."[248] Brennan also discussed the meaning of this term but avoided the conclusion reached by Stevens when he stated that the debates "never precisely defined the term 'discrimination,' or what constituted an exclusion from participation or a denial on the ground of race."[249] Brennan claimed that the "fragmentary comments" relied upon by Stevens "fall far short of supporting a congressional intent to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination."[250] It is odd, however, that "fragmentary comments" do "compel" interpreters to acknowledge "the clear judgment of Congress that race-conscious remedial action is permissible."[251]

A further example of the conflicting conclusions made from the same, voluminous legislative history is this: Justice Stevens attested that Title VI, as supported by underlying legislative history, is "crystal clear" (not just clear) that, "[r]ace cannot be the basis of excluding anyone from participation in a federally funded program."[252] The Brennan opinion countered the claim made by Justice Stevens with its own: it was the "clear judgment" of Congress that race-conscious remedial action *is* permissible.[253] This opinion again relied on the same remarks used by Justice Stevens to support the contention that Title VI would not prohibit federal funding of programs using racial classifications if they are *consistent* with Constitutional standards.[254]

---

[247] *Id.* at 336-37, 340 n.17.

[248] The passage cited by Justice Stevens is as follows: "'[T]he word 'discrimination' . . . really means . . . a distinction in treatment . . . given to different individuals *because of their race*, religion or national origin. [I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, or white ones, but as Americans. If we did that we would not need to worry about discrimination." *Id.* at 415 (Stevens, J., concurring).

[249] *Id.* at 338 (Brennan, J., concurring).

[250] *Id.* at 340 n.17 (Brennan, J., concurring).

[251] *Id.* at 355.

[252] *Id.* at 418. Justice Stevens goes on to say that "[n]othing in the legislative

The different results presented by these opinions reflect earnest approaches to interpreting and applying Title VI within a factual context. This context pits the legitimate interests of people like Bakke against a well-intentioned and justifiable (both legally and morally) policy of ending long-standing discrimination against racial minorities. Underlying this policy was a painful history of the exclusion of minority groups, particularly African-Americans, from enjoying the benefits and opportunities of being American citizens.

With a degree of caution, I employ a word whose use I criticized above: it seems *clear* that each of the three major opinions understood the plight of Mr. Bakke[255] as well as the persistent discrimination that plagued members of minority groups for centuries.[256] A problem of great magnitude facing each interpreter, especially the Justices of the Court, consisted of two related issues: (1) how should the statute be construed to do the most good in achieving the needs of society (and of its individual members) which it was designed to address; and, (2) how should the statute be construed to meet society's needs which were not foreseen by the enacting legislature but which it must still address?

The heart of the disagreement in *Bakke* was not grounded in ideological differences. The source of disagreement, rather,

---

history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. . . . In unmistakable terms the Act prohibits the exclusion of individuals from federally funded programs because of their race." *Id.*

[253] *Id.* at 355.

[254] *Id.* at 332.

[255] *Id.* at 319-20, 361, 375 (Brennan, J., concurring), 412 (Stevens, J., concurring).

[256] *Id.* at 285, 355 (Brennan, J., concurring), 413 (Stevens, J., concurring).

was rooted in the fictions derived from the "voluminous" legislative history and how these fictions are employed by the interpreters of the statute. The Brennan opinion asserted that the statute and its legislative history are "clear" and "compel" a judgment which finds the exclusion of a white male from a special admissions program (not the entire admissions process) of the Davis medical school to be valid under both the broad language of the statute and the Constitution.[257] Justice Stevens was equally convinced that Title VI was enacted to end discrimination by fostering a race-neutral and color-blind society.[258] Both opinions illustrate how many elements of the same legislative history support these conflicting results. Justice Powell's opinion represents a middle ground between these first two opinions. He, too, relied on legislative history to demonstrate that while race may be a factor in assessing candidates[259] (a principle shared with the Brennan opinion[260]), it cannot be used to exclude a person from participation in a program that is federally funded[261] (a principle shared with Justice Stevens[262]).

Yet, legislative history does have a role to play in the interpretation of legal texts, especially statutes.[263] It is not a principal one that clarifies with specific determinacy the meaning of a statute. It does not make "clear" or "compel" the intention of Congress in enacting Title VI. The legislative history is an aid to construe the statute, but it cannot be relied on to define what the authors intended in every factual context. There often is simply too much conflict or too much ambiguity within most legislative histories, including the "voluminous" one of the Civil Rights Act, to conclude objectively what was the specific will of the legislature. The search for intent as the only source of discerning the meaning of the legal text is an elusive and frustrating quest. Perhaps we might have more luck in discerning the text's meaning by looking for its purpose.

---

[257] *Id.* at 337-38.

[258] *Id.* at 413, 415, 416 n.19, 418.

[259] *Id.* at 287, 296 n.36.

[260] *Id.* at 325-26 (Brennan, J., concurring).

[261] *Id.* at 320.

[262] *Id.* at 414, 416, 418 (Stevens, J., concurring).

[263] *See, e.g.*, Peter L. Strauss, *When the Judge Is Not the Primary Official with Responsibility to Read: Agency Interpretation and the Problem of Legislative History*, 66 CHI.-KENT L. REV. 321, 322 n.3 (1990). Strauss argues that it is important for agencies who interpret the meaning of statutes they have been authorized to enforce to examine legislative history even though "judicial refusals to consider the political history of legislation easily turn into the substitution of judicial pleasure to that of the legislative body." *Id.* William Eskridge, who promotes a "dynamist" theory of interpretation and eschews "archaeological" investigations into legislative history, *see* ESKRIDGE, *supra* note 12, concludes in an essay that legislative history, like The Federalist Papers, can provide illumination about underlying normative values of legislative texts. William N. Eskridge, *Legislative History Values*, 66 CHI.-KENT L. REV. 365, 440 (1990). *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (arguing case for use, not "abuse", of legislative history). *But see* Frank H.

(4) An Understanding of Purpose

Often mistaken for the concept of underlying intent is that of the text's purpose.[264] Intent generally concerns the institutional or individual author's meaning which is given to the words that make up the legal text. Purpose, on the other hand, more directly involves the broader teleological issues (the goals) which the text was designed to address and accomplish.

I would like to suggest that the distinction between the two concepts (while not always clear and precise) might be made in the following way: intent refers to a consciousness of the drafters about the surrounding circumstances that served

---

Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); Easterbrook, *supra* note 101, at 533 (noting arguments in favor of textual reading and against reliance on legislative history). For other articles on statutory interpretation and legislative history, see Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005 (1992) (critiquing Justice Scalia's view that statutory interpretation must not depend on legislative history), and William S. Jordan, III, *Legislative History and Statutory Interpretation: The Relevance of English Practice*, 29 U.S.F.L. REV. 1 (1994) (explaining approach to understanding utility and difficulties with legislative histories).

[264] *See generally* Reed Dickerson, *Statutory Interpretation: A Peek Into the Mind and Will of A Legislature*, 50 IND. L.J. 206 (1975). Dickerson states that while the concepts of "legislative intent" and "legislative purpose" overlap in their broadest senses, "the concept of 'legislative intent' is in disfavor with many writers, that of 'legislative purpose' enjoys not only favor but preeminence. For most, it is the touchstone of statutory interpretation." *Id.* at 224.

as a catalyst for the drafting the text and the broad meaning originally given to the text.[265] The legislative intent does not ordinarily reflect consciousness of factual contexts in which the text may be applied in the future. It does reveal what was on the legislators' minds at the time of enactment. The purpose of the statute deals more with the results of the text and what it may achieve. Often, these results are defined within the context of a substantive case; thus, a legal text's meaning is molded by the factual context. Both intent and purpose deal with the meaning of the text. The first concerns itself more with the period surrounding enactment; the second is geared to the future goals of the normative text as it is defined by factual cases in which the substantive provisions of the text are applied.[266]

Karl Llewellyn once suggested that "[i]f a statute is to make sense, it must be read in the light of some assumed purpose. A statute merely declaring a rule, with no purpose or objective, is nonsense."[267] I believe that the "assumed purpose" about which Llewellyn spoke is actually the general understanding of the legislature which acknowledges the existence of some actual or potential situation the text was designed to address by establishing guidelines that would be followed to address these situations in the future.

---

[265] There are different levels or facets of intent. For example, within Congress there is a multitude of "intents" which may be identified by the Committee, a political party, regional composition of members who generally share views on specific issues, alliances formed by a desire to protect an industry and its labor force, as well as those that may reflect well-organized special interests. There is also subjective intent and objective intent. There is collective and institutional intent. In ascertaining what sorts of intents are to be explored, the interpreter may ask whether the authors of a statute intended the words to mean something according to its plain language or according to some special sense about the words. As will be seen in subsequent discussion of the *Bakke* case, some interpreters view legislative history as an important device to determine legislative intent. However, the uncritical use of legislative history as a tool to discover any of these legislative intents can mean using the more ambiguous (legislative history) to determine the less ambiguous (the statute).

[266] See REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 88 (1975), for a discussion about the distinction between intent and purpose. The basic distinction made by Dickerson is that immediate or specific "purposes" of legislation are what most lawyers think of as intent, whereas the more broad and remote "purposes" are what are generally thought of as legislative purpose. *Id.*

[267] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395, 400 (1950). *See also* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561 (1992) (endorsing Llewellyn's thesis concerning problems of interpretive canons and further

While the author's intent may be a fiction in that the legislature (or other drafter) did not apply the guidelines of the statute to factual cases as they arise, the text's interpreters (such as lawyers, judges, and the citizenry affected by the operation of the statute) may well ask the question: how would the drafters apply the guidelines of the drafted norms to the case before us? The interpreter looks back to the "legislative intent" and then defines the purposes of the legal text in the case's context. The construction of the text by the interpreter draws from the facts of the case and relates them to the issues which the legislature or other drafter dealt with on a more abstract level when it wrote the text.[268]

Let me return to the hypothetical ordinance once again to illustrate my discussion. This time I shall use the factual context in which a motorist is driving his car on a street adjacent to the park during heavy rush-hour traffic. Without warning, the car develops mechanical problems, and the driver stops the

---

suggesting that legislatures have important duty to preserve "public values" contained in legislation against judicially assumed purposes that can defeat legislative intent). *But see* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992) (arguing case of moderate and prudent reliance on canons can be "perfectly consistent with society's interests").

[268] For an interesting and informative discussion and theoretical analysis of linguistic theory and its application to the practical interpretation of legal texts, see M.B.W. Sinclair, *Law and Language: The Role of Pragmatics in Statutory Interpretation*, 46 U. PITT. L. REV. 373 (1985). According to Sinclair, statutes are communications of the legislature, but because the legislature communicates in only a written and not a verbal form, its participation in applying its communications to actual circumstances is severely constricted. *Id.* at 420. By developing a practical statutory interpretation, it is Sinclair's hope that while the legislature said as much as it could in the clearest way possible, something further is needed to implement its intent. *Id.* The rules of interpretation relying on linguistic theory focus "on the actual use of words in the full context of their use." *Id.* Sinclair concludes by stating that meaning is attached to legislative speech when it is fully developed in actual contexts. *Id.*

automobile to determine what is the matter. He opens the hood and discovers that the engine is smoking. It is unclear whether the cooling system is malfunctioning or whether the engine itself is responsible for generating the smoke. Rather than take any chances in driving to the nearest service station, the driver decides that it would be better to have his mechanic friend look at the car where it is. Since the flow of the heavy traffic was obstructed by his car (the street has a ban on parking during rush hour), the motorist drives his car off of the street a few feet and onto one of the adjacent park paths. The motorist then leaves the scene and takes a bus to get the mechanic. When he returns about an hour later, a police officer is placing a ticket under the windshield wiper. The officer cited a violation of the ordinance which prohibits motor vehicles in the park.

Within this discussion, we can assume that the car is a motor vehicle and that there is no dispute about it being in the park. The disagreement between the police officer and the owner of the disabled car focuses on whether this vehicle's presence in the park falls within the scope (purpose) of activity the ordinance is supposed to address. For some commentators, the purpose of a statute emerges once factual circumstances begin to put some contextual flesh onto the bare bones of the generally-worded statute.[269]

---

[269] Professors Hart and Sacks suggest that the first step in this process is to decide what purpose *ought* to be given the statute. HART & SACKS, *supra* note 5, at 1374. Second, interpret the words in such a way as to implement as effectively as possible the language of the statute in the context of the case. *Id.* These authors hasten to add the caveat that the words are not given a meaning (1) they will not support *and* (2) which would "violate any established policy of clear statement." *Id.* The case of *Bob Jones University v. United States*, 461 U.S. 574 (1983), illustrates the point made by Hart and Sacks that an interpretation of a statute should not give it a meaning which would violate any established policy of clear statement. *Bob Jones University* involved construction of § 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) which, among other things, grants charitable institutions such as schools tax exempt status. *Id.* at 577-78 n.1. The university had a policy of prohibiting interracial marriage and dating. *Id.* at 580-81. The Internal Revenue Service challenged this policy and retroactively revoked the school's tax exempt status back to the date on which the policy was implemented. *Id.* at 581. The Fourth Circuit Court of Appeals reversed the District Court which had ruled in favor of the university. *Bob Jones University*, 639 F.2d

We might agree that the language of the statute deals with three basic issues: (1) motor vehicles; (2) their presence in a park; and (3) a prohibition against motor vehicles being in the park. As an interpreter examines the facts of this case in the context of the prohibition, imagine the following scenario: the interpreter acknowledges the presence of a motor vehicle in the park; she considers the purposes for which the car was brought into the park; she thinks of reasons why it might be necessary to have motor vehicles in the park. In undertaking this exercise, she puts the flesh of context on to the statutory skeleton. Much of this effort is to understand what problems did the legislature want to address and what remedies did the legislature consider which deal with these problems.

The interpreter assembles the factual data and relates them to the normative text: the car experiencing mechanical problems is a motor vehicle; it is in the park; and, the presence of motor vehicles in the park seems to be prohibited by the ordinance. It would also seem that the unfortunate driver upon returning to the vehicle could have reasonably expected to see the citation which was under the wiper blade, unless, of course, it can be argued that the statute was not enacted to prohibit this situation, i.e., a stranded motorist seeking temporary shelter for his disabled car from a dangerous situation about which the ordinance is silent.

As our interpreter ponders the facts of this situation within the context of the statute, she reaches some conclusions about the meaning of the ordinance as it applies to these facts. Her first conclusion could well be that the purpose of prohibiting joy riders from the park makes sense because the presence of the

---

147 (4th Cir. 1980), *rev'g*, 468 F. Supp. 890 (D.S.C. 1978). In its reversal, the Court of Appeals stated that the university's interracial prohibition "violated the *clearly* defined public policy, rooted in our Constitution, condemning racial discrimination and . . . the government policy against subsidizing racial discrimination in education, public or private." *Id.* at 151 (emphasis added). The Supreme Court affirmed the decision of the Fourth Circuit. *Bob Jones University*, 461 U.S. at 605. In doing so, the Court stated that when entities like Bob Jones University so violate public policy (i.e., the prohibition against interracial fraternization and marriage), they cannot be deemed to provide the public any benefit worthy of tax exemption under § 501(c)(3). *Id.* at 598-99.

joy riding motorists would substantially interfere and compete with the pedestrians, joggers, and bicyclists who have traditionally used the park paths. She imagines how an automobile can barely fit on the narrow paths of the park and how its presence would force all other users off the path (where they might have to climb over the walls and fences, stand in the shallow lily pools, or trample flower beds) in order to make way for the moving vehicle. She can further imagine how a motor vehicle could quickly come upon other users of the paths without warning and pose other hazards associated with the operation of motor vehicles in confined areas.

However, our interpreter also wonders if the vehicle parked for emergency reasons poses the same hazards to the park users as would a moving vehicle. She cannot envision how the presence of the stationary, disabled motor vehicle would pose the same kind of problems as would a fast-moving vehicle. She sees the stationary car confined to one small area of the park. As the park's users encounter it, they come upon it at their own pace rather than at the pace of a moving vehicle. It does not threaten them as a moving vehicle might. She also recognizes that the disabled car is on the periphery of the park where people leaving or entering the park would presumably be more attentive as their surroundings begin to change; thus, the presence of the parked car should not create any problem for them. She concludes that the car is more like a temporary obstruction (such as a tree which fell during a recent wind storm and had not yet been removed) than a dangerous instrumentality such as a moving vehicle.

Since the statute does not address temporary obstructions (like fallen trees), she asks whether the ordinance should encompass the temporary obstruction of the car which is at the very edge of the park? She further asks why should a statute that was enacted to protect park users from the threat of moving motor vehicles apply to a stationary object that is in the park to prevent some other danger from happening (i.e., the potentially dangerous obstruction that the disabled vehicle poses if it were to remain in the midst of the rush hour traffic)?

This interpreter concludes that the presence of the disabled car in the park was not the sort of circumstance the statute was designed to regulate. She sees the action taken by the police officer as being inconsistent with the purposes for which the statute was designed to enhance. The conclusions of this interpreter reflect the examination of another statute and its corresponding purposes by the Supreme Court when it interpreted the Act of February 26, 1885[270] in *Church of the Holy Trinity v. United States.*[271]

In this case, the church corporation entered an agreement with an Anglican clergyman who resided in England.[272] The substance of the agreement was that the minister would come to the United States and serve the corporation at its church in New York City.[273] While finding that the agreement and subsequent service of the Anglican clergyman in the United States constituted a literal violation of the Act,[274] the Court went on to say that, "we cannot think that Congress intended to denounce with penalties a transaction like that in the present case . . . . [A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intentions of its maker."[275]

The Court concluded its examination of the statute and its application to the facts of the case by stating that the expressed *purpose* of the statute was to prevent manual laborers from entering the United States under the terms of an employment agreement; its purpose should not be extended to prohibit a professional man from entering the country to serve as a clergyman even though the proposed activity he would exercise in the United States would fall within the activity of labor or other services prohibited by the statute.[276]

---

[270] 23 Stat. 332, c. 164. This Act stated in pertinent part that

> [i]t shall be unlawful to prepay the transportation, or in any way assist or encourage the importation or migration of any alien . . . any foreigner . . . into the United States . . . under contract or agreement . . . made previous to the importation or migration of such alien or . . . foreigner . . . to perform labor *or service of any kind* in the United States . . . .

Id. (emphasis added).

[271] 143 U.S. 457 (1892).

[272] *Church of the Holy Trinity*, 143 U.S. at 457-58.

[273] *Id.* at 458.

[274] *Id.* It is significant to note that the Act provided for certain exceptions including professional actors, artists, lecturers, singers, and domestic servants. *Id.* at 458-59. It was silent about clergymen, however. Since the clerical role did not fall within one of the specific exemptions, it could be reasonably argued that providing the services of a cleric would fall into the prohibited general category of "services of any kind."

[275] *Id.* at 459.

A reading of the entire opinion highlights Justice Brewer's conclusion that there was a problem of contracting with alien manual laborers but not with alien clergymen. Justice Brewer stated that "[i]t was never suggested that we had in this country a surplus of brain toilers, and . . . that the market for the services of Christian ministers was depressed by foreign competition."[277] The jingoistic attitude of the opinion (and perhaps the general feeling among many Americans of the time) identified the "evil" which Congress addressed as the "ship[ping] of great numbers of an ignorant and servile class of foreign laborers . . . [who] agreed to work . . . at a low rate of wages."[278] It seemed that this practice had an adverse effect on the native manual laborer who was reduced to the level of assisted immigrant.[279]

Not being comfortable with a literal (i.e., a plain meaning) application of this statute to the facts of this case (which the Court believed would lead to an absurd result[280]), the Court searched legislative committee reports and discovered a justification for reaching a purposive interpretation of this statute.[281] The Court quoted from the blunt language of the committee report which stated that the statute

> seeks to restrain or prohibit the immigration or importation of laborers who would have never been on our shores but for

---

[276] *Id.* at 463.

[277] *Id.* at 464.

[278] *Id.* at 463.

[279] *Id.* at 463-64.

[280] As the majority stated, "[t]he language of the act, if construed literally, evidently leads to an absurd result. If a literal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity." *Id.* at 460.

[281] *Id.* at 464-65.

> the inducements . . . of men whose only object is to obtain labor at the lowest possible rate, regardless of the social and material well-being of our own citizens and regardless of the evil consequences which result to American laborers from such immigration. This class of immigrants care nothing about our institutions, and in many instances never even heard of them . . . . They are generally from the lowest social stratum, and live upon the coarsest food and in hovels of a character before unknown to American workmen . . . . The inevitable tendency of their presence among us is to degrade American labor, and to reduce it to the level of the imported pauper labor.[282]

The "problem" Congress seemed to address was in part socially defined (ethnic dislike of poor, unskilled immigrants) and in part economically motivated (protection of the American manual laborer). The Court continued in its own language by declaring that

> beyond all these matters no purpose of action against religion can be imputed to any legislation . . . because this is a religious people . . . . In the face of [the history of the important role of religion in the history of the United States],[283] shall it be believed that a Congress . . . intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation?[284]

This question with which the Court concluded its opinion is a rhetorical one. The Court answered by reversing the Circuit Court which found that the contract was prohibited by the Act.[285] At least in the case of *Church of the Holy Trinity*, the purpose underlying the statute eclipsed the meaning of the simple, direct, and seemingly unambiguous language of the statute. Thus, the unmistakable clarity of the plain language was sacrificed for a more opaque purpose extracted from the legislative history. Could it be that the factual context of *Church of the Holy Trinity* was really determinative of the outcome? We consequently turn to an examination of the contextual or dynamic approach of interpretation.

---

[282] *Id.* at 465.

[283] I have summarized in brackets what the Court elaborates in several paragraphs about the significant role of religion in American history. *Id.* at 465-70.

[284] *Id.* at 465, 471.

[285] *Id.* at 472.

(5) The Relevance of Factual and Temporal Context

Contextualism is a term that I use to describe those theories of interpretation, particularly statutory, such as those developed by William Eskridge (dynamic interpretation)[286] and Alexander Aleinikoff (nautical interpretation),[287] which are more concerned with the temporal and factual contexts of the application of the statute than with the intents of the authors and the purposes its members addressed when debating the text's language. Contextualism is a method of interpretation which deals with legal texts not at the time they were enacted, not with the history of their development, or with the precision (or imprecision) of the language found in their text, or with rules of interpretation (i.e., canons of construction that foster "mechanical jurisprudence"), or with an excavation of intent or purpose, but with the circumstances and conditions (i.e., the context) in which legal texts are applied.[288]

---

[286] *See* ESKRIDGE, *supra* note 12; Eskridge, *supra* note 12.

[287] *See* Aleinikoff, *supra* note 12.

[288] For an interesting thesis about how legislators may take into account the mental context of the interpreters (and the contexts in which these individuals interpret the legal texts) when the legislators draft legal texts, see Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretations of Statutes*, 75 VA. L. REV. 561 (1989). This thesis is developed within D'Amato's general idea that "there can never be a definitive theory or set of rules of interpretation." *Id.* at 562. By way of contrast, the reader may find informative D'Amato's earlier essay, wherein he provocatively examines the arguments for and against replacing human judges with legal opinion-making computers—a strong form of sophisticated yet mechanical jurisprudence. Anthony D'Amato, *Can/Should Computers Replace Judges?*, 11 GA. L. REV. 1277 (1977). Michael Moore maintains that "[j]udges should guide their judgments about the ordinary meanings of words by the real nature of the things to which the words refer and not by the conventions governing the ordinary usage of those words." Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 279, 287 (1985). A principal justification for this in Moore's estimation is that legal texts should not be read "without asking the safety-valve question of justice and fairness." *Id.* at 397. For Moore, this question is due to the realism which American society exercises concerning "moral

Contextualism can provide meaning to legal texts by taking account of circumstances that the enacting legislature did not foresee or could not have foreseen. The context in which the statute is interpreted concerns at least two realms: (1) *temporal*: the time at which the legislation is interpreted and the time in which the text was drafted and approved, and (2) *material*: the facts of the case and the surrounding circumstances in which the text is applied. Although it shares some elements with other methods of interpretation,[289] contextualism is fundamentally concerned with interpreting a text in the present.[290]

Concern about and recognition of the significance of the context in which the text is interpreted is not a recent development in legal interpretation. While Aleinikoff and Eskridge have done much to emphasize and cultivate what this approach does, they are not the first to promote the contextual method. The importance of a legal text and its relevance to people and their needs which may not have been foreseen by the text's drafters was recognized almost fifty years ago in an American

---

interpretation" which ensures that law will serve a "just society." *Id.*

[289] Contextualism addresses the statute's language, intent, and purpose. It can even address legal texts in the context of what the law ought to be rather than simply what the law is. In a way, *Church of the Holy Trinity* represents some elements of contextualism. A literalist or textualist would not have applied the statute in the way the Supreme Court did in *Church of the Holy Trinity*. Eskridge views his contextual approach to interpretation as "not static, but dynamic. Interpretation is not an archaeological discovery, but a dialectical creation. Interpretation is not a mere exegesis to pinpoint historical meaning, but hermeneutics to apply that meaning to current problems and circumstances." Eskridge, *supra* note 12, at 1482 (footnotes omitted).

[290] As Eskridge has stated, "[s]tatutes, however, should—like the Constitution and the common law—be interpreted 'dynamically,' that is, in light of their *present societal, political, and legal context*." Eskridge, supra note 12, at 1479 (emphasis added). Aleinikoff similarly suggests with regard to recent statutes that he "would try to understand a statute primarily based on its words, structure and *other aspects of the legal and social context*." Aleinikoff, *supra* note 12, at 61 n.160 (emphasis added). Justice Scalia has noted his robust disagreement with such an approach: "What I think is needed, however, is not rationalization of this process but abandonment of it. It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is." SCALIA, *supra* note 9, at 22.

context by Arthur Phelps[291] and Charles Curtis.[292] Phelps understood that courts, and presumably other interpreters, "must ask [themselves] not only what the legislation means abstractly, or even on the basis of legislative history, but also *what it ought to mean in terms of the needs and goals of our present society*."[293] Curtis was critical of interpreters who try to think what "legislatures would have done."[294] He said that this

> doctrine of guessing at what the legislature would have done is no better than asking what the legislature intended. It too puts the court back to the time when the statute was passed, shoving the whole process of interpretation as far back into the past as possible . . . . Better be prophetic than archaeological, better deal with the future than with the past . . . . Better that the courts should set their decisions up against the possibility of correction than make them under the shadow of a fiction which amounts to a denial of any responsibility for the result."[295]

In a sense, Judge Cardozo was a harbinger of Phelps and Curtis almost thirty years earlier when he likened the interpreter (i.e., a judge) to "a wise pharmacist who from a recipe so general can compound a fitting remedy."[296] Although past interpretation—precedent—was very important for Cardozo, he acknowledged that "when there is no decisive precedent" the judge "must then fashion law for the litigants before him. In fashioning it for them, he will be fashioning it for others."[297]

---

[291] *See* Arthur W. Phelps, *Factors Influencing Judges in Interpreting Statutes*, 3 VAND. L. REV. 456 (1950).

[292] Charles R. Curtis, *A Better Theory of Legal Interpretation*, 3 VAND. L. REV. 407 (1950).

[293] *See* Phelps, *supra* note 291, at 469 (emphasis added).

[294] *Id.*

[295] *See* Curtis, *supra* note 292, at 415.

[296] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 162 (1921). Judge Cardozo elaborated his point by saying that the interpreter "must balance all his ingredients, his philosophy, his logic, his analogies, his history, his customs, his sense of right, and *all the rest*, and adding a little here and taking a little there, must determine, as wisely as he can, which weight shall tip the scales." *Id.* (emphasis added).

One of the earliest commentators who suggested a contextualist theory of interpretation was Justice Holmes. He emphasized that the surrounding circumstances can contribute to the understanding and meaning of a statute.[298] Justice Frankfurter also offered a contextualist approach for reading and ascertaining the meaning of legal texts.[299] The emphasis made by contextualism as a means of legal interpretation concentrates on the time in which the text is applied, not in the past.

Some members of the United States Supreme Court have exhibited various measures of sympathy with contextual interpretations of legal texts.[300] Although he holds the general view that the meaning of legal texts is often clear from their words,[301] and is critical of the Eskridge approach,[302] Justice Scalia believes that it is desirable (given the mechanisms to protect against rash changes in agency interpretations) that federal administrative agencies (to which Congress delegates considerable power to interpret and implement legal texts) be able to "suit [their] actions" to the demands and needs of the times.[303] Still, a lingering problem with contextualist or dynamist approaches is that they tend to be subjective—i.e., what does the judge think—and are inclined to ignore the history or evolution of shared understanding about the meaning of normative texts that has developed over time.[304]

---

[297] *Id.* at 21.

[298] *See* Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1898-1899).

[299] *See* Frankfurter, *supra* note 157, at 537.

[300] *See* discussion, *supra* II B 3. As I demonstrate in this discussion about *Bakke*, Justices Powell, Brennan, White, Marshall, and Blackmun rely on some contextualist methodologies in interpreting Title VI of the Civil Rights Act of 1964. *Id.*

[301] *See* Scalia, *supra* note 101, at 521.

[302] *See* SCALIA, *supra* note 9, at 22. The Justice argues that what is needed about "dynamic" interpretation is not rationalization but abandonment, or as he continues, "[i]t is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is." *Id.*

[303] *See* Scalia, *supra* note 101, at 518. Aleinikoff has acknowledged that in instances where the language of the statute is not clear, Justice Scalia employs some "nautical instruments" (i.e., uses a contextual approach) in his interpretation of unclear legislation. *See* Aleinikoff, *supra* note 12, at 30, 38.

Let me again turn to the hypothetical park ordinance and use it to illustrate the concept of contextualism. The town recreation committee would like to install a miniature race car track within the park. Although miniature racing cars generally have relatively small horsepower, I will assume for this discussion that they do meet the technical requirements of the definition for motor vehicles and that the track on which they might operate would include at least some of the park paths used by pedestrians, bicyclists, and joggers. However, I will add a twist to this story: at the time the ordinance was enacted, miniature racing cars did not exist; since no one had ever seen one, they were not within anyone's contemplation when the ordinance became law. Moreover, even though the technical definition of "motor vehicle" seems to cover the miniature racing cars, the legislative history of the ordinance is punctuated with numerous references about the dangers posed by large vehicles operating in the park.

An issue which the contextualist-interpreter quickly disposes of is whether the intent of the town council (viz. elimination of large vehicles from the park) and the purpose underlying the statute (viz. elimination of vehicles which could suddenly and quickly come upon the users of the paths) warrant cancellation of the plan for the miniature racing cars. Since contextualism is more concerned with the existing issues of the present and less with those of by-gone days, it would seem reasonable to conclude that the ordinance would prohibit the proposed use of the miniature racing cars for recreational purposes. This type of interpretation does not concentrate on what the drafters of the statute had in mind or did not have in mind when they wrote it; it is concerned with the current interests of society.[305] If one of its current interests is to keep users of the park safe from dangers posed by fast-moving vehicles, then a contextualist could the ordinance so as to prohibit miniature racing cars.[306]

---

[304] *See* D'Amato, *supra* note 12.

[305] *See* ESKRIDGE, *supra* note 12, at 21. This is not always how courts have looked at this issue, however. For example, consider the statute originally enacted in 1786 requiring municipalities to keep their roads "reasonably safe and conve-

The majority opinion in *United Steelworkers v. Weber*[307] represents a contextualist approach to statutory interpretation. In that case, the Court examined the application of Title VII of the Civil Rights Act of 1964[308] to a voluntary preferential hiring and training program instituted by the employer and the union. The program agreed upon by the United Steelworkers and Kaiser Aluminum, was structured to "eliminate conspicuous racial imbalances in Kaiser's then almost exclusively white craftwork forces."[309] In a class action suit, a more senior white worker rejected from the program (while more junior black employees were accepted for training) contested the legality of the affirmative action plan under section 703 (a) of the Act.[310]

---

nient for travelers, with their horses, teams and carriages at all seasons." One case raised the question whether this statute required cities and towns to keep roads "reasonably safe" for automobiles as well. Doherty v. Ayer, 83 N.E. 677 (Mass. 1908). In *Doherty*, the Supreme Judicial Court of Massachusetts concluded that this statute did not extend to keeping roads "reasonably safe" for motor vehicles. *Id.* at 679. The rationale focused not on safety but on economic considerations. As Hart and Sacks suggest, the safety policy advanced by the legislature was for horse-drawn vehicles. HART & SACKS, *supra* note 5, at 1185. "It should not be held to have so declared as to much higher costs for auto travel, not foreseen because not foreseeable." *Id.* This interpretation does imply a distinction between modes of conveyance; it really, however, does not draw any substantive distinction between the safety of those traveling by horse-and-carriage and those traveling by automobile.

[306] This conclusion is based on the assumption that the miniature racing cars would roam the path used by other users of the park. The contextualist interpreter might reach a different conclusion if the racing cars were used in a restricted area of the park reserved exclusively for this activity.

[307] 443 U.S. 193 (1979).

[308] 42 U.S.C. § 2000e (1982).

[309] *Weber*, 443 U.S. at 198.

[310] 42 U.S.C. § 2000e-2(a) states in pertinent part:

> (a) It shall be an unlawful employment practice for an employer— (1) to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin; or (2) to limit . . . his employees or applicants for employment in any way which would deprive . . . any individual of employment opportunities or otherwise adversely

The District Court held that the plan violated Title VII and entered a judgment in favor of the class action plaintiffs enjoining Kaiser and the union from denying the plaintiffs "access to on-the-job training programs on the basis of race."[311] A majority of the three-judge panel of the Fifth Circuit affirmed the District Court judgment noting that "Congress has forbidden racial preferences in admission to on-the-job training programs, and . . . we are not empowered by the equitable doctrine of restorative justice to ignore that proscription."[312] After granting review, a majority of the Supreme Court reversed.[313]

Much of the majority's interpretive method can be described as a contextualist approach to the interpretation of Title VII of the Civil Rights Act. The majority emphasized the "narrowness" of its inquiry of whether Title VII "*forbids*" private employers and labor organizations from voluntarily agreeing upon an affirmative action plan that was designed to "eliminate traditional patterns of racial segregation."[314] While recognizing that the class action plaintiffs' argument had force,[315] the Court concluded that Title VII must "be read

---

> affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(d), 42 U.S.C. § 2000e-2(d), provides:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

[311] Weber v. Kaiser Aluminum & Chem. Corp., 415 F.Supp. 761, 770 (E.D. La. 1976).

[312] Weber v. Kaiser Aluminum & Chem. Corp., 563 F.2d 216, 227 (5th Cir. 1977).

[313] *Weber*, 443 U.S. at 200. Justice Brennan, writing for the majority, was joined by Justices Stewart, White, Marshall, and Blackmun. *Id.* at 195. Chief Justice Burger and Justice Rehnquist dissented. *Id.* Justices Powell and Stevens took no part in the consideration or decision of the case. *Id.*

[314] *Id.* at 200-01.

[315] *Id.* at 201. In stating that the class action plaintiffs' argument was "not without force," the majority referred to the often quoted language from *Church of the Holy Trinity* "that a thing may be within the letter of the statute and yet not

against the background of the legislative history of Title VII and the historical context from which the Act arose."[316] While the Court acknowledged the historical context in which Title VII was enacted, it is evident that the majority was also concerned about the present context of the continuing exclusion of African-Americans from the craft positions at Kaiser's plant.[317] It construed Title VII so as to permit voluntary affirmative action plans "designed to eliminate conspicuous racial imbalance in traditionally segregated job categories."[318]

Although the language of the applicable provisions of Title VII appeared to support the contentions of Brian Weber and the other class-action plaintiffs, the majority focused on the fact that African-Americans were still not being admitted to

---

within the statute, because not within its spirit, nor within the intention of its makers." *Id.* (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

[316] *Id.*

[317] *Id.* at 198-99, 204 n.4. Earlier, I emphasized that contextualism is concerned with the present, not the past. I do not believe there is any substantive inconsistency between my understanding of contextualism's focus on the *present* and *Weber's* use of the term *historical context*. The phrase "historical context" refers to *both* historical conditions of segregation which existed prior to and at the time the Civil Rights Act of 1964 was enacted *and* remained, albeit in more subtle fashion, at the time the *Weber* case arose. In other words, segregation, while not as blatant in the 1970's as it was prior to 1964, still could be found. While craft union jobs were *de jure* not segregated they were *de facto* in that the number of blacks holding these positions compared with the number of blacks in the relevant labor pool was remarkably disproportionate. In the estimation of the *Weber* majority, segregation had evolved into a more subtle form of discrimination against minorities, particularly blacks, in that very few of them were admitted to the more skilled labor positions.

[318] *Id.* at 209. Earlier in its opinion, the majority pointed to the disproportionate number of African-Americans in the applicable craft unions (1.83% in 1974) compared with their representation in the general Kaiser workforce (39%). *Id.* at 198-99. This reliance on and use of sociological data reflects the ideas of Lawrence Friedman of using the social sciences to understand the "loose, wriggling, changing subject matter" of the law. *See* Lawrence M. Friedman, *The Law And Society Movement*, 38 STAN. L. REV. 763, 766 (1986); *see also* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908). While still a practicing attorney, Justice Brandeis skillfully used analyses of sociological data to help in the interpretation of legal texts and to provide the court with a different, often deeper perspective into their meaning. *See Mueller v. Oregon*, 208 U.S. 412 (1908).

craft positions such as those at the Kaiser Gramercy plant involved in *Weber*. Did this mean that the letter (i.e., the text) of the law was insufficient to meet the social conditions which originally prompted the need for Title VII? If so, the majority was prepared, even if its method remained ambiguous, to promote integration (one goal of Title VII),[319] at the expense of tolerating (i.e., not eliminating) "benign" racial discrimination in the form of the preferential treatment under affirmative action programs.[320] By reaching this result, the majority demonstrated that it was more concerned with the spirit of Title VII, the elimination of the present inequality in employment which had deep historical roots, than with the letter of Title VII, which flatly stated that any discrimination based on considerations of race, color, national origin, gender, or religion was illegal. In essence, the needs and goals of contemporary society would be better served if the Court took decisive action to prevent the perpetuation of a more subtle form of inequality. In the estimation of the majority, it was permissible to stamp out the employment inequality experienced by African-Americans by temporarily[321] tolerating benign discrimination.

A strong case for a contexualist interpretation could have been made in *McBoyle v. United States*.[322] However, Justice Holmes stated that when Congress enacted the National Motor Vehicle Theft Act in 1919, "[a]irplanes were well known in

---

[319] *Weber*, 443 U.S. at 203. The majority opinion suggests that equality-in-principle is not much good if you cannot get a job because of your race.

[320] As Eskridge suggests about the criticism the majority of the Supreme Court had for the Fifth Circuit:

> To fulfill this statutory purpose [obtain more jobs for blacks], the [Supreme] Court reasoned it should broadly validate voluntary affirmative action programs such as the plan in *Weber*. [The Fifth Circuit's] argument . . . subordinates one purpose of Title VII—obtaining more jobs for blacks—to another—creation of a color-blind society. Two central purposes of the statute conflict in the *Weber* case, and the [Supreme] Court offered no persuasive justification to prefer its purpose over the competing one.

Eskridge, *supra* note 12, at 1491.

[321] *Weber*, 443 U.S. at 208.

[322] 283 U.S. 25 (1931); *see supra* text accompanying notes note 55-59.

1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress."[323] But what would happen if a type of conveyance had not been known when the drafters enacted the legal text but, subsequent to enactment, such a device was invented and became commonplace. Should it be covered by the statute since it seemed to be a technological development of the type of thing covered by the statute but essentially replaced the conveyances mentioned in the statute? This was the question posed in the case of *Doherty v. Town of Ayer*.[324] In that case, the plaintiff sued to recover the repair cost for damage to his automobile.[325] The accident was caused by a defect in a publicly maintained street which the town of Ayer was under a statutory duty to keep in repair.[326] The statutory duty was based on legislation first enacted in 1786 requiring municipalities to keep their public ways "reasonably safe and convenient for travelers, with their horses, teams and carriages at all seasons of the year."[327] The plaintiff argued that the automobile in which he had been traveling—a horseless carriage, if you will—was a "carriage" for the purpose of the statute, and the trial court agreed by instructing the jury that an automobile was a carriage within the meaning of the Act.[328] Thus, while automobiles did not exist in 1786 when the statute was enacted, they did exist in the twentieth century when the accident took place. Under a contextual approach, the eighteenth century statute could be logically applied to the facts. After all, it could be sensibly argued that automobiles were in the process of replacing horse-drawn vehicles such as carriages. Although the equipment was different, it served the same purpose as that mentioned in the venerable statute. Nonetheless, the Supreme Judicial Court, by making a distinction paralleling that of Justice Holmes in *McBoyle*,[329] pointed out that the type of carriage mentioned in the text is drawn by animal power;[330] consequently, an automobile was declared not to be a "carriage" within the meaning of the statute because it is not propelled by animal power but by an internal combustion engine.[331] By relying on a contextual approach, the statute could be easily updated by including automobiles into the definition of carriage, but the court refused to do this. Even though automobiles were becoming the twentieth century functional equivalent of the common eighteenth century conveyance, the court refused to acknowledge this contextual evolution. I would argue that a contextual approach can keep older normative texts vital, avoiding the need to amend them when technological advancements replace things mentioned in legal texts with their successors. Still, this is not to suggest that contextual or dynamic methods of interpretation are without blemish.

---

[323] *McBoyle*, 283 U.S. at 26.

[324] 83 N.E. 677 (Mass. 1908).

[325] *Doherty*, 83 N.E. at 678.

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] "It is a vehicle that runs, not something, not commonly called a vehicle,

A helpful avenue to pursue this last point is to examine the latest, most comprehensive examination of contextual or dynamic approaches, William Eskridge's recent book *Dynamic Statutory Interpretation*.[332] His thesis is that statutory interpretation should be dynamic, that is, it should not necessarily be "the one which the original legislature would have endorsed,"[333] because "as the distance between enactment and interpretation increases, a pure originalist inquiry becomes impossible and/or irrelevant."[334] That is not necessarily true, however. While I believe that many, if not most, interpreters today would agree that the 1786 "carriage" language of the Massachusetts statute in *Doherty* could have encompassed the twentieth century automobile, we should not automatically assume that older legal texts can endure contemporary meanings. The key here is to inquire about the flexibility of the original language and to appreciate the general intent of and the goals or purposes of the authors. These historical tools are

---

that flies." *McBoyle*, 283 U.S. at 26.

[330] *Doherty*, 83 N.E. at 678-79.

[331] *Id.*

[332] Eskridge, *supra* note 12.

[333] *Id.* at 5.

[334] *Id.* at 6.

extremely valuable in giving the late twentieth century interpreter some important guidelines needed to test the extent to which the language can bear a contextual approach as presented by the Eskridge dynamist theory.[335] Eskridge is quite correct, as can be seen in the *McBoyle* and *Doherty* cases, when he argues that changed circumstances most certainly raise "important consequences" for interpretation of normative texts.[336] But we must restrain the urge to read these texts dynamically without first asking some foundational questions about the degree to which the text can bear the meaning imposed by the dynamist. Like rubber bands, the meaning of language and the general concepts to which the authors intended the language to apply can stretch only so far without breaking. To avoid stretching the text's language to the breaking point, the interpreter should be simultaneously rooted in the past—the past of the authors as well as the history of the text's interpretation—and the present moment of application of the text. If one is only concerned with the changing "horizon" of the text and "the interaction between text and interpreter . . . as the statute is applied to new factual contexts,"[337] the interpreter may be blinded to the fact that the connection between the text and the circumstances has "snapped" because it could not endure the strain placed upon it. The coherent connections between the present application and the past of the text—including the time of its drafting and the evolution of its interpretation—have been severed. Professor Eskridge is largely correct when he stated that the growth of meaning is constructive, meaning that the process of interpretation cannot be too subjective. As he noted, the science of interpretation, hermeneutics, "rejects the idea that individual beliefs necessarily dominate interpretation; the interpreter's horizon is itself dominated by traditions and not by prejudices idiosyncratic to the interpreter."[338]

---

[335] I therefore disagree with Professor Eskridge's categorical view that "[a]s a positive matter, all originalist theories fail." *Id.* at 13. As I shall argue later, every theory has its weaknesses. However, as I also point out in my section on synthesis, these theories when used by themselves—including originalist ones—do contribute to the establishment of a coherent approach to interpreting the most important public legal texts of statutes and constitutions.

[336] *Id.* at 52.

[337] *Id.* at 63.

Of course, caution should be applied to the dynamist theories for several related reasons. Advocates and judges are not legislators; therefore, they cannot be confused about the limits of their roles in applying contextual or dynamic interpretations that lead to violations of the constitutional doctrine of separation of powers.[339] Now, courts do eschew the role of invading the province of the legislature, as was seen in *Chung Fook*, *McBoyle*, and *Doherty*. However, there are occasions, as will be seen later in *Riggs v. Palmer*,[340] where judges usurp the power of the legislature and rewrite the statute contrary to plain and textualist meanings. When the *Weber* case was remanded to the Fifth Circuit, Judge Gee, who wrote the original opinion reversed by the Supreme Court majority, noted in his remand decision, that while the decision "in some basic sense . . . may well represent true justice,"[341] it was still, according to the law in this case, (Title VII of the Civil Rights Act of 1964) "profoundly wrong."[342] Professor D'Amato illustrates his separation of powers concern with the case of *School Board v. Arline*[343] in which a majority of the Supreme Court read the Rehabilitation Act of 1973 to reinstate as a "handicapped individual" a public school teacher who had been terminated from her teaching position because of her susceptibility to tuberculosis.[344]

---

[338] *Id.* at 65. The author goes on to state that there can and do exist some "shared understandings" of the meaning of texts. *Id.* As he continues, "[a]n important reason why statutory interpreters start with and pay such close attention to the text's plain meaning is their pre-understanding that people rely primarily on the statutory text when they figure out what the law requires and plan their activities accordingly." *Id.*

[339] *See* D'Amato, *supra* note 12. Another critique of the dynamic approach as being "anti-democratic," is that offered in Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803 (1994). The authors provide an alternative to the wide discretion accorded to judges by the dynamists. *Id.* at 809. Their "textualist originalism" is a hybrid interpretive approach committed to the primacy of the legislature, not the judiciary, in the policy-making process that underlies finding the meaning of normative texts. *Id.* In order to restrain judicial power, the courts must "consult other legislative sources [evidence of legislative intent and statutory purposes] to inform statutory text." *Id.* at 809.

[340] 22 N.E. 188 (1899). "In the absence of . . . legislation here, the courts are not empowered to institute such a system of remedial justice." *Id.* at 192 (Gray, J., dissenting).

[341] Weber v. Kaiser Aluminum & Chem. Corp., 611 F.2d 132, 133 (5th Cir. 1980).

[342] *Id.*

In his critique of the *Arline* decision, D'Amato constructs two other powerful and related points about the flaws with dynamist approaches. The first is that litigants go into court to resolve the dispute over which they find themselves in conflict; however, there is no way of predicting what the law really says until the dynamist judge has decided what policies really control the legal text's meaning.[345] His second point emerges from the first: if citizens do not have a sense of what the law is as they enter today's controversy, how can they possibly be able to predict what that law requires them to do in the future? As D'Amato succinctly states, "How can we possibly plan our lives on the basis of the law of tomorrow when we can't predict what that law will be?"[346] Without an anchor in the text itself, its plain and textual meanings, and an honest assessment of what drafters and earlier interpreters thought about intent and broad purpose, today's citizen is at a loss and can imagine that Humpty Dumpty is not simply the fictitious creation of Lewis Carroll, but is a real human: the judge sitting on the bench.

While the search for predicting the meaning of the law advances, a question may be raised at this point: is too much emphasis placed on sophisticated methods that draw from too many variables? Perhaps if the interpretive method relied on strict rules of interpretation, many of the uncertainties about the results of interpretation might be avoided. Consequently, we turn to a body of such rules, the canons of construction.

---

[343] 480 U.S. 273 (1987).

[344] The Rehabilitation Act prohibits any federally funded state program from discriminating against a handicapped individual solely by reason of the handicap. As Professor D'Amato notes, the Rehabilitation Act did not include people with contagious diseases as being considered handicapped and therefore protected. D'Amato, *supra* note 12, at 920.

[345] *Id.* at 929, 935.

[346] *Id.* at 935. D'Amato rhetorically continues: "Are courts that are attracted to dynamic statutory interpretation teaching us that we can no longer know and rely on the rule of law in our daily lives because months or years later they can use policy considerations to make new law and apply that law retroactively to us? Doesn't dynamic statutory interpretation amount to unconstitutional *ex post facto* legislation?" *Id.*

(6) Canonical Tools

Generally speaking, the canons of construction are rubrics designed to assist the interpreter in a mechanical and automatic fashion in her effort to ascertain the meaning of a statute. Examples of these canons include the following:

1. Legal texts in derogation of the common law will be narrowly construed;
2. Legal texts *in pari materia*[347] are to be read together;
3. If language is plain and unambiguous, it must be given effect;
4. Words and phrases which have been given a judicial construction before enactment into a statute are to be interpreted according to that construction;
5. Expression of one thing excludes another;
6. Where general words follow an enumeration (*ejusdem generis*), they are to be held as applying only to persons and things of the same kind or class specifically mentioned.[348]

These canons have, for the most part, lost favor with many interpreters of legal texts because either they are too mechanical and restrictive[349] or they are neutralized by competing canons.[350] Other interpreters, however, take a more cautious approach by suggesting that wholesale repudiation is unwise and unrealistic while still recognizing the definite limitations of mechanically applying the canons to factual contexts.[351] Although reference is often made to the interpretive canons by judicial interpreters, their value is ordinarily of marginal significance.[352] At best, the canons seem to be rules of general experience rather than hard-and-fast rules of interpretation.[353] The experience derived from their application in one case is no guarantee that the canons will provide or enjoy the same experience in another.

---

[347] This canon pertains to the interrelationship of one statute to another, i.e., legal texts which pertain to the same subject matter are to be read together. A contemporary adaptation of this canon is offered by Sunstein who suggests that "statutes regulating the same subject should be construed harmoniously." *See* Sunstein, *supra* note 101, at 458. Sunstein suggests that one way of accomplishing this in the age of agency-administered programmatic statutes is to defer to the interpretations of legislation given by the agencies responsible for enforcing them. *Id. See also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 738-39 (1989) (Scalia, J., concurring). Justice Scalia persuasively advances the position that the more general provisions of 42 U.S.C. § 1981 regarding liability for violations of civil rights should be read in light of the exclusions of 42 U.S.C. § 1983, a closely related statute which more directly dealt with the alleged offenses in this case. *Id.* As Justice Scalia states, "[W]here text permits, statutes dealing with similar subjects should be interpreted harmoniously." *Id.* at 739.

[348] This sample was taken from a list compiled by Karl Llewellyn. *See* Llewellyn, *supra* note 267, at 401-06.

Each of us as prospective interpreters should keep this caveat about the canons in mind: a canon of construction is a rule similar to the legal texts it is designed to address and help interpret. As a rule, each canon relies on language to convey a meaning to the interpreter/user as to how the canon should be applied to the normative text being interpreted. In essence, the canons themselves are open to interpretation, both where they overlap and potentially conflict with the provisions of other canons, and, also, where they conflict with their own internal provisions.[354]

Cass Sunstein has developed a revised set of canons—or norms—designed to assist the interpretation of regulatory legal texts.[355] The canons developed by Sunstein rely on constitutional norms and serve the purposes of deliberative government, particularly that of a regulatory nature.[356] Although the last cannon has apparently not been fired in this debate over the significance and role of the interpretive canons, it will presumably be some time before the effects and effectiveness of the Sunstein rubrics can be assessed.[357]

---

[349] *See* Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805-17 (1983).

[350] Llewellyn, *supra* note 267, at 401.

[351] *See* DICKERSON, *supra* note 266, at 227-28; *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925-26 (1992) (arguing for reliance on traditional canons because, by fostering reading of statutes in context of norms of canons, these axioms promote conservative interpretations that achieve statute's objectives).

[352] *See* DICKERSON, *supra* note 266, at 227-36.

[353] *See* Frankfurter, *supra* note 157, at 544-45.

[354] Thus canons might need their own canons to assist in their self-interpretation. *See* HART, *supra* note 44, at 123.

[355] *See* Sunstein, *supra* note 101. Sunstein has commented on Llewellyn's discarding of the traditional canons:

At this point, I return once more to the hypothetical ordinance and explore the use of interpretive canons in this familiar context. Putting aside for the time being Sunstein's "something like canons of construction,"[358] I wish to apply Llewellyn's criticism of the traditional canons to the motor vehicle statute we have been examining. Problems of meaning begin to materialize when the traditional canons are used to interpret the motor vehicle prohibition ordinance. Applying the established canons to this simple statute illustrates the conflicts between and among the results of the interpretations derived from their use.

Let us first assume that having a motor vehicle in the park for some particular reason (e.g., driving an elderly person to the band stand located in the middle of the park so she can hear a concert) is something that a reasonable person might do; moreover, this would be an activity protected by common law right to use the park in a reasonable fashion. But by prohibiting the presence of motor vehicles, the ordinance restricts this

---

> Llewellyn's demonstration was persuasive insofar as it characterized the use of canons as a crude version of formalism. In fact, however, his claim of indeterminacy and mutual contradiction was greatly overstated; some of the canons actually influenced judicial behavior insofar as they reflected background norms that helped to give meaning to statutory words or to resolve hard cases. The notion that courts should narrowly construe statutes in derogation of the common law is the most prominent example.

Id. at 452.

[356] *Id.* at 413.

[357] *See* Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 217 (1987) for the significance that the passage of time has on the reliability of proposed means of interpretation.

[358] Sunstein, *supra* note 101, at 504.

common law right to use the public park. One of the traditional canons of construction is that a statute in derogation of the common law must be strictly constued.[359] Since the ordinance derogates the common law, it must be strictly construed. However, there is another canon which states that remedial legal texts are to be liberally construed. Since the ordinance is designed to implement a remedial purpose (viz. to protect users of the park from dangers posed by motor vehicles operating in it) the statute should be liberally construed. The conflict between and among competing canons now becomes evident.

There is another canon stating that legal texts providing for criminal penalties are to be narrowly interpreted. Let us further assume that the park ordinance provides for criminal penalties for a person convicted of violating the motor vehicle statute. So, if the ordinance provides for criminal penalties of any sort, it should be strictly construed under the terms of this canon. Thus, depending on the interpretive canon used, the ordinance can be given either a broad or a narrow construction. Again, the interpreter witnesses more conflict.

Another example of conflict amongst the canons would be the following: since the only statute defining *motor vehicles* is that which requires registration of motor vehicles, it must be read *in pari materia* with the park ordinance. However, the registration ordinance does not cover all kinds of motor vehicles (e.g., miniature racing cars) which may pose safety hazards in the park (i.e., the registration ordinance has a different scope and aim than the park prohibition ordinance). Therefore, it is not *in pari materia*.

---

[359] This canon seems to be hibernating during this age of statutes. However, like Banquo's ghost, it occasionally reappears. The concept underlying this canon is, that at the time of the statute's interpretation, there exists a common law doctrine (or potentially in existence) that pertains to the issue treated by the statute. The statute, if given the proffered interpretation, would substantially change (i.e., derogate) the common law doctrine. *See* Barbara Page, *Statutes in Derogation of Common Law: The Canon as an Analytical Tool*, 1956 WIS. L. REV. 78-79; *see also* Jefferson B. Fordham and J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438 (1950). Professors Fordham and Leach suggest that as presumptive rules like the "derogation" canon become of little help, they should be replaced by interpretive methods which rely on extrinsic aids, especially legislative history. *Id.* at 454-55.

Or how about this conflict: assume that an ambulance is a motor vehicle. Since motor vehicles are prohibited from the park, then ambulances are prohibited from the park under the plain meaning rule. But let us apply another canon: the general terms of the statute (i.e., "motor vehicle") are construed to apply only to terms similar in nature to them. Suppose that the ordinance includes an enumeration of pleasure and personal transportation vehicles in the context of *motor vehicles*. Under this last mentioned canon, then, the general term *motor vehicle* must be limited and should not apply to ambulances because they first of all do not fit within the type or classification of motor vehicles generally referenced in the enumeration, and, second, they are important safety equipment whose purpose and scope of uses transcend those of the types of motor vehicles enumerated in the park ordinance.

I could go on and continue to show conflict between more of the traditional canons in the context of interpreting the hypothetical ordinance. Rather than doing that, it might be more profitable to consider how the United States Supreme Court dealt with a conflict between interpretive canons in *NLRB v. Catholic Bishop of Chicago*.[360] In *Catholic Bishop* there were several interpretive canons at work.

The case involved whether the National Labor Relations Board (NLRB) had unfair labor practice jurisdiction over the lay faculty of high schools operated by the Roman Catholic Archdiocese of Chicago and the Bishop of Fort Wayne-South Bend[361] under sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.[362] The lay faculty of these high schools sought and voted for union representation with the Illinois Education Association. The Archdiocese refused to recognize the union as the teachers' bargaining agent.[363] The NLRB contended that it had jurisdiction because, under its own guidelines for enforcing the National Labor Relations Act, the schools were "religiously associated" and not "completely religious." The NLRB had previously determined that "religiously associated" schools were subject to the Act whereas "completely religious" schools were not.[364] The NLRB based its decision that the schools were "religiously associated" on the fact that they taught secular as well as religious subjects.[365]

---

[360] 440 U.S. 490 (1979).

[361] There was a companion case involving similar allegations made against the Diocese of Fort Wayne-South Bend, Inc. which was not reported. *Catholic Bishop*, 440 U.S. at 493 n.6.

[362] 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1994).

[363] *Catholic Bishop*, 440 U.S. at 494.

A majority of the Supreme Court affirmed the Seventh Circuit's denial of the NLRB enforcement order[366] which found that the NLRB's distinction between the two types of religiously affiliated schools was not a workable guide for informing parties about the NLRB's discretionary jurisdiction.[367] To avoid deciding the constitutionality of the application of the National Labor Relations Act to the facts in this case, the Court relied on the interpretive canon that avoids construing a statute "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."[368]

By exercising this canon, the Court interpreted the statute in such a way that it would avoid the Establishment Clause issue in this case. The majority agreed that "Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers."[369] In reaching this conclusion, the majority devised a new canon in the process: something not clearly within Congress's "expressed intent" of items included in the statute is excluded from the statute's coverage.[370]

While acknowledging the existence of the canon construing legal texts "to avoid unnecessary constitutional decisions,"[371] the dissenters objected to the majority's methodology and approach to the Constitutional and statutory issues in *Catholic Bishop*. From the perspective of the dissenters, the majority really decided that the statute exempted the archdiocesan schools because there was no "*clear* expression of an *affirmative intention* of Congress" to bring the teachers employed by these church-operated schools within the jurisdiction of the Board and the Act.[372] To the dissenters' way of thinking, the majority avoided addressing the statutory issue when the majority concluded that the lay teachers were exempt from the statute's provisions in the first place. The dissenters noted that the Act provides for certain, well-defined exceptions to the Act, none of which applied to the lay teachers. Therefore, there was *no* "clear expression of an affirmative intention of Congress" to exempt these teachers.[373]

---

[364] *Id.*

[365] *Id.* at 493. The Board had previously decided that the schools involved in this case were "religiously associated." *Id.*

[366] *Id.* at 495.

[367] *Id.*

[368] *Id.* at 507.

[369] *Id.* at 506.

[370] *Id.* at 507.

The dissenters cited a case which they believed established the proper order for considering Constitutional and statutory issues found in the same case: the question of the Constitutionality of the statute is put aside until the Court first "ascertain[s] whether a construction of the statute is fairly possible by which the [Constitutional] question may be avoided."[374]

The dissenters criticized the majority for not following the canons in their "proper" order, particularly when Congress specifically mentioned eight exemptions under the statute, none of which applied to the Catholic schools.[375] In the dissenters' opinion, it was inappropriate to raise the constitutionality canon as a subterfuge without first addressing the statutory issues and ascertaining if the statute applied to the case (which they felt it did, given the specific exemptions identified by Congress, none of which applied to the lay teachers), and then determining whether an interpretation of the statute avoiding the constitutional issue could be made.[376]

---

[371] *Id.* at 508.

[372] *Id.* at 509 (Brennan, J., dissenting) (emphasis added).

[373] *Id.* at 517-18 (Brennan, J., dissenting).

[374] *Id.* at 510 (Brennan, J., dissenting) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932) (Brennan, J., dissenting)).

[375] *Id.* at 511 (Brennan, J., dissenting).

Without addressing the substantive issues of the case, we can see how the application and misapplication of interpretive canons can obfuscate more than they clarify the meaning of a legal text.[377] *Catholic Bishop* provides evidence of Justice Frankfurter's admonition that canons of construction cannot save the interpreter from "the anguish of judgment."[378] All this leads one to borrow from Sir Isaac Newton's theory of gravity: for every canon, there is always opposed an equal canon.[379]

Another case illustrating the weakness of using interpretive axioms to discern the meaning of legal texts is *United States v. Campos-Serrano*.[380] At issue was whether the respondent, Campos-Serrano, had violated 18 U.S.C. § 1546 when he used a counterfeit alien registration card, which does not permit an alien to enter the United States for the first time, to reenter the United States.[381] The Court of Appeals held that the "re-entry function" of an alien registration card, which is not mentioned in § 1546 of the United States Code, was sufficient to make it a "document required for entry into the United States."[382] In 1952, the Immigration and Naturalization Service (INS) promulgated a new regulation that enabled the alien registration certificate to be used as a substitute for a visa when a resident alien re-entered the United States from a contiguous country.[383] This regulation was amended in 1957 to expand the use of such a certificate for reentry from any country.[384] In an opinion written by Justice Stewart, a majority of the Supreme Court disagreed with the INS.[385] In reaching this conclusion, the majority relied on the canon that "penal statutes" such as § 1546 of the United States Code "are to be construed strictly."[386]

---

[376] *Id.* at 508-09 (Brennan, J., dissenting). It is interesting to note the human side of the Justices as revealed in this case. The Justices in the minority of *Catholic Bishop* (White, Brennan, Marshall, and Blackmun) were concerned about the intent of Congress as expressed by the language of the National Labor Relations Act, particularly in view of the eight exemptions to the Act's coverage. However, in *Weber*, these same Justices "gloss over" Congressional intent underlying Title VII and decide that it is more important to dwell on the law's spirit than on its letter. A similar critique can be made of Justice Rehnquist and Chief Justice Burger who take great pains to examine the spirit of the law in *Catholic Bishop* but are satisfied that the literal meaning and color-blind language of Title VII as applied in *Weber* would not permit the affirmative action program.

[377] Like the Light Brigade made famous by Alfred Lord Tennyson, which had cannons volleying and thundering to their left and right, the statutory interpreter can be similarly surrounded by the thundering of conflicting canons of construction.

[378] *See* Frankfurter, *supra* note 157, at 544. Justice Frankfurter viewed the canons as generalizations of experience having worth and as abstractions which rarely arouse controversy. Yet, "[d]ifficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge." *Id.*

[379] *See* ISAAC NEWTON, PRINCIPIA 13 (Andres Motte trans., Univ. of Cal. Press 1962) (1687). "To every action there is always opposed an equal reaction."

[380] 404 U.S. 293 (1971).

[381] *Campos-Serrano*, 404 U.S. at 295-96.

At the core of this interpretive axiom is the plain meaning rule: if the plain and ordinary meaning of the text's language does not cover the precise action for which the defendant was indicted, the statute was not violated.[387] To further justify its conclusion, the majority pointed out that alien registration certificates serve a very different purpose: they "identify the bearer as a lawfully registered alien residing in the United States."[388] But one is issued an alien registration certificate only if that person has gained legal admission to the United States. In Campos-Serrano's situation, he had never achieved legal admission into the United States,[389] and the registration certificate he used for "re-entry" was forged.[390] Assuming that there is merit to the canon relied upon by the majority, it could be argued that even penal statutes are not to be read so strictly that they become meaningless. Upon examination of the legislative text, we see that Congress was concerned with the use of forged documents, documents that were used to gain admission into the United States. After specifying specific types of documents, it included the phrase "or other document required for entry." Although "alien registration certificates" were not mentioned by name, they were used by the INS to admit aliens to enter the United States even though they had presumably been in the United States before. But the basic concept of the legislation was to thwart the use of forged documents by aliens to come into the United States, be the admission for the first or subsequent time [all admissions are entries], and this the majority seemed to lose sight of when they applied the canon so narrowly.

---

[382] *Id.* at 297 (citing United States v. Campos-Serrano, 430 F.2d 175 (7th Cir. 1970)).

[383] *Id.* at 297 n.10.

[384] *Id.*

[385] *Id.* at 297.

[386] *Id.* at 207.

[387] *Id.* at 298.

[388] *Id.* at 299-300.

[389] *Id.*

[390] *Id.* at 294.

(7) The Common Law or Equity of Legal Texts

During the past couple of decades, a number of judges and legal scholars have considered whether statutory law has a common law dimension.[391] The 1970 Supreme Court decision in *Moragne v. States Marine Lines, Inc.*[392] in large part paved the way for the examination and development of this judicial doctrine. *Moragne* addressed the preclusion of a wrongful death action originating from a fatal accident involving a longshoreman that occurred within state territorial waters under existing federal maritime law.[393] While there was no specific statutory remedy directly applicable to assist Mrs. Moragne, whose husband was the longshoreman killed on board the vessel while it was still within state territorial waters, the Court noted that the general rule in American law concerning wrongful death actions is to allow recovery, while denial of recovery is the exception.[394] The Court also acknowledged that Congress "has established a policy favoring recovery in the absence of legislative direction to except a particular class of cases. . . . We find that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death to persons in the situation of this petitioner."[395]

---

[391] For an excellent introduction and thoughtful discussion of using statutes beyond their terms as sources of judge-made law, see Robert Williams, *Statutes as Sources of Law Beyond Their Terms in Common Law Cases*, 50 GEO. WASH. L. REV. 554 (1982). Williams argues that statutes have a yet-unfilled role in American law, viz. the ability to contribute to legal reasoning beyond a statute's express terms. *Id.* at 558. He suggests that statutes possess underlying policies which "have significance beyond the text they inspired." *Id.* at 556.

[392] 398 U.S. 375 (1970).

[393] Prior to *Moragne*, complainants were foreclosed from bringing such an action under federal maritime law for such wrongful death attributable to a breach of maritime duties. The Court overruled the precedent, *The Harrisburg*, 119 U.S. 199 (1886), which had previously barred recovery for this type of injury.

If any individual text were read by itself, then the language of the statute precluded relief. But the Court chose not to limit itself to using the legislative texts in a conventional manner. In granting relief to the petitioner, the Court fashioned a judicial remedy from a group of legal texts which, when read together, suggested that recovery should be made available to the widow.[396] The Court construed a remedy by using common law principles to reason from legal texts rather than from judicial precedent as would normally be done under the common law.[397]

An earlier example of a court attempting to rely on the equity or common law of the statute is the case of *Riggs v. Palmer*.[398] The New York Court of Appeals was confronted with the matter of young Elmer Palmer, who accelerated the testamentary gift his grandfather had provided for in the latter's will by murdering the elder Palmer. The legal text presumably at issue was the New York statute concerning the revocation of wills, but, as the dissent pointed out, wills could not be revoked unless one or more specific steps had been taken by the testator or other specified conditions or circumstances were met.[399] None of these specific steps, conditions, or circumstances existed in this case. Yet, the majority made an argument from the equity of the statute doctrine. In writing for the majority, Judge Earl said,

---

[394] 398 U.S. at 393.

[395] *Id.*

[396] *Id.* at 397-98.

[397] *See generally* Note, *The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution*, 82 YALE L.J. 258 (1972).

[398] 22 N.E. 188 (N.Y. 1889).

[399] *Riggs*, 22 N.E. at 191 (Gray, J., dissenting).

> The writers of laws do not always express their intention perfectly, but either exceed it or fall short of it, so that judges are to collect it from probable or rational conjectures only . . . . Such a construction ought to be put upon a statute as will best answer the intention which the makers had in view, for [he who considers merely the letter of the law goes but skin deep into its meaning] . . . . In (citations omitted), many cases are mentioned where it was held that matters embraced in the general words of statutes nevertheless were not within the statutes, because it could not have been the intention of the law-makers that they should be included. They were taken out of the statutes by an equitable construction . . . . The reason for such construction is that the law-makers could not set down every case in express terms . . . . In some cases the letter of a legislative act is restrained by an equitable construction; in others, it is enlarged; in others, the construction is contrary to the letter . . . . If the law-makers could, as to this case, be consulted, would they say that they intended by their general language that the property of a testator or of an ancestor should pass to one who had taken his life for the express purpose of getting his property?[400]

In contrast to *Riggs v. Palmer*, the New York Court of Appeals in the 1958 case of *Schuster v. New York*[401] provided a better integration of statutory law and the common law. In *Schuster*, a family brought a wrongful death action against the city when one of its younger members was killed by an anonymous assassin. Young Max Schuster, aware from reading an FBI wanted poster that the civil authorities were attempting to apprehend a fugitive named Willie Sutton, provided the New York City police with information concerning the fugitive's whereabouts.[402] No sooner had Sutton been arrested than Schuster began to receive threats on his life.[403] Although Schuster informed the local police about these death threats, he was mortally shot by an unknown assailant within a few weeks of Sutton's arrest.[404]

---

[400] *Id.* at 189 (citations omitted).

[401] 154 N.E.2d 534 (1958).

[402] *Id.* at 536.

[403] *Id.*

Schuster's family subsequently brought a wrongful death action against the City of New York arguing that the City failed to use reasonable care for his security by not adequately protecting him after he had cooperated with law enforcement officials regarding the apprehension of Sutton.[405] The duty for authorities to protect those who aid police authorities in the arrest or prosecution of criminals is established under New York common law.[406] Moreover, Schuster had a common law reciprocal duty to aid the authorities.[407] However, it was section 1848 of the Penal Code of New York which established an "absolute liability against municipal corporations for damages arising from the personal injury or death of persons injured or killed while aiding policemen at their discretion in making arrests."[408] The court hastened to concede that section 1848 did not apply to Schuster's case in that he was killed not while the arrest was made but some three weeks later by an individual whose identity and connection with Sutton's apprehension was never established.[409] But the court noted that while the statute codified a policy of compensating those who aid the police under specific circumstances not in existence in the *Schuster* case, the statute did not preclude a common law remedy paralleling that contained in the statute.[410] The difference between the statutory and the common law remedies was that the former did not rely on negligence but absolute liability once the fact of police request and citizen cooperation were established; the common law remedy on the other hand had to be established on negligence, and, in this case, the alleged negligence was the failure to adequately protect young Schuster once he informed the police of the threats made on his life.[411] The nexus between the statute and the development of a common law remedy was this: the remedial policy underlying the statute was designed to provide "care and solicitude for the private citizen who cooperates with the public authorities." This underlying justification for the statute, according to the majority, contributed the remedial principles needed to form the common law, and "like court decisions that are not strictly analogous, [they] sometimes point the way into other territory when the animating principle is used as a guide."[412] The court concluded that this wrongful death action was "within the spirit if not the coverage of Section 1848"; thus, even though the specific statutory remedy could not be the basis of the wrongful death action, the statute's existence dispelled any "inference" that the common law of New York would not provide a parallel remedy for this tragic loss.[413]

---

[404] *Id.*

[405] *Id.*

[406] *Id.* at 536-38.

[407] *Id.*

[408] *Id.* at 539. The statute also made it a misdemeanor for a citizen to fail to come to the aid of a police officer once the latter commanded the former to render assistance. *Id.*

[409] *Id.* The dissent amplifies why the statute could not apply. As the dissent pointed out, section 1848 was not applicable because (1) Schuster's acts were not performed pursuant to a command of the arresting officer but were voluntary and (2) Schuster's death did not arise out of the actual arrest but occurred some several weeks after the fact. *Id.* at 545 (Conway, C.J., dissenting). Judge Froessel, in his dissent, noted that the legislature had the prerogative of defining the limits of a municipality's liability, and, it is clear from the manner in which section 1848 was drafted that the legislature did "not wish to extend liability to situations not embraced within the statute." *Id.* at 548 (Froessel, J., dissenting).

In *Moragne* and *Schuster*, the courts took statutes which generally applied to the issues but specifically did not apply to the cases; however, the court logically and judicially extended the statutory principles to construct remedies for Mrs. Moragne and the Schuster family. However, in *Riggs v. Palmer*, the court was faced with an entirely different circumstance. There were no principles that it could logically extend because the statute was silent on such matters. Rather, it substituted itself for the legislature and reached a conclusion that the majority believed the legislature would have reached had they, the legislature, thought about the question presented in *Riggs v. Palmer*. Essentially, then, the *Moragne* and *Schuster* courts extended statutory principles to common law reasoning and development, but in *Riggs v. Palmer* there was nothing to extend.

---

[410] *Id.* at 539-40.

[411] *Id.* at 540.

[412] *Id.*

[413] *Id.*

The development of a "common law" based on a statutory foundation did not end with the opinions in *Moragne* and *Schuster*. Noting that the American legal system has become increasingly statutorified, Judge Guido Calabresi has commented that judicial interpretation of statutes must be recast to deal with the deluge of new legal texts.[414] Calabresi saw the legislatures retaining initiative in lawmaking, but he suggested that the courts exercise their common law function to see "to it that the law is kept up to date."[415] The focus of Calabresi's concept has been to "permit the courts to keep anachronistic laws from governing us without thereby requiring them to do tasks for which they are not suited, or denying to the legislatures the decisive word in the making of constitutionally valid laws."[416]

Judge Calabresi argued that the common law function of the courts is a judgmental one which should transcend sunset or automatic updating provisions which some legal texts contain.[417] The guiding principle for the courts (assuming that there is validity and substance to his common-law-of-legal texts concept) seems to be whether old legal texts should be reaffirmed by the legislature. If not, the courts have the responsibility to deal with the statute, and that duty

---

[414] GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES, 31 (1982).

[415] *Id.* at 7.

[416] *Id.* at 2. Judge Calabresi does not define what he means by "anachronistic" statutes. He does offer some limited insight into what might be anachronistic when he comments that the age of a statute (and the period in which it was enacted), while not determinative, is "a major factor influencing the propriety of shifting away from a retentionist bias." *Id.* at 133. On the other hand, it seems significant to acknowledge that the age of a statute often evidences its ability to serve the public over a long period. This notion is reinforced by the possibility that old statutes are frequently interpreted flexibly in order to give them continuing vitality. The age of a statute should not, in itself, be a "major" factor in ascertaining whether it has become "anachronistic." On the contrary, a statute's age illustrates its ability to meet the continuing needs of society and its adaptability to meet those needs which change as time progresses. It would be better to suggest that interpretations of statutes rather than the statutes themselves become "anachronistic."

[417] *Id.* at 164.

> is no more and no less than the critical task of deciding when a retentionist or revisionist bias is appropriately applied to and existing statutory or common law rule. It is the judgmental function (which cannot be successfully accomplished by sunset laws or automatic updatings) of deciding when a rule has come to be sufficiently out of phase with the whole legal framework so that, whatever its age, it can only stand if a current majoritarian or representative body reaffirms it.[418]

A major concern with the concept of judges repealing "anachronistic" legal texts, as they might overrule common law precedents, is that this notion challenges the tripartite system of American republican democracy and the separation of powers doctrine. Judges do have the obligation of determining what the law means and declaring legal texts invalid on Constitutional grounds.[419] But the Constitution also provides that the Congress has legislative supremacy. It alone has the authority and responsibility, which *it* may partially choose to delegate to agencies, to enact legal texts and, when *it* so decides, to repeal them.[420] While some commentators have argued that legislative supremacy is a "shibboleth,"[421] judicial repeal of legal texts is not permissible interpretation; it is impermissible evisceration. If the Calabresi theory stands for updating older legal texts that were enacted by a society with different concerns from those of the society during which the statute is interpreted, then his theory should be considered as just one way of dealing with legal texts.[422] However, if updating really means repeal of legal texts by judges, then the courts have invaded the province of the legislature.[423]

---

[418] *Id.* (emphasis in original).

[419] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[420] "All legislative powers herein granted shall be vested in a Congress of the United States . . . ." U.S. CONST. art. I, § 1.

[421] *See* William N. Eskridge, *Spinning Legislative Supremacy*, 78 GEO. L.J. 319, 352 (1989). *See generally* Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989) (acknowledging that supremacy principle is narrow, but considering its limitations, sheds light on crucial aspects of judicial role). Farber, while recognizing that Judge Calabresi has not suggested so, states that "when the statutory language and legislative history make the statute's meaning unmistakable, such interpretation is more in the nature of a partial repeal . . . and should be rejected." *Id.* at 307, 309. *See generally* Williams, *supra* note 391, at 598-99 (recognizing that legislative supremacy is acknowledged by judiciary in fact as well as theory).

Modifications of this common law approach in dealing with legal texts has gained currency with other academics. Richard Pildes has urged that courts commit themselves to a common law model of statutory interpretation.[424] As will be seen, his approach in this task differs substantially from that of Judge Calabresi. He stated that "[r]ather than always being bound by the positive commands of a statute's words or professing adherence to undefinable concepts of legislative intent or purpose, courts would explicitly reason from and develop statutory principles in the tentative, incremental fashion of the common law."[425] In contrast to Calabresi, Pildes emphasized that his common law approach to interpreting legal texts does not grant the courts a license to ignore legislative will. He views his concept of interpretation as one that encourages the courts to implement legislative will.[426] Pildes, unlike Calabresi, does not advocate supremacy for the courts. In his estimation, the legislatures have the sole authority to define state and national priorities.[427]

---

[422] *See* Nicholas Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 361 (1989). Zeppos points out some constitutional flaws in the Calabresi notion of judicial repeal of statutes. *Id.* at 380-81. I am troubled by the stigma which Judge Calabresi seems to place against old statutes. Most legal texts are written with sufficiently general terms that the mere issue of age should not threaten either their vitality or resilience years after they have been enacted. Yet, as my discussion of the *Doherty v. Ayer* case illustrates, some judges are unwilling to take account of technological developments and other changes, such as the replacement of horse-drawn carriages with horseless carriages, when they interpret statutes.

[423] See Frankfurter, *supra* note 157, at 533 for wise counsel about constraints imposed on judges by our American democratic society.

[424] Richard Pildes, Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court,* 95 HARV. L. REV. 892 (1982). Mr. [now Professor] Pildes is identified by Prof. Aleinikoff as the author of the Harvard Law Review student note. *See* Aleinikoff, *supra* note 12, at 29 n.48.

[425] Pildes, *supra* note 424, at 913 (citations omitted). Reed Dickerson has voiced his criticism about the Pildes note. *See* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History,* 11 HOFSTRA L. REV. 1125, 1157 (1983). In part, Dickerson criticizes the Pildes' view which holds that courts should determine what the words of legal texts *ought* to mean rather than *what* they mean. *Id.*

A voice of restraint and caution about using the common law approach to interpreting legal texts has been raised by Michael Socarras. He reminds us that courts do not necessarily reflect majoritarian views found in American politics.[428] Recognizing the importance of the separation of powers doctrine and the need for compromise between the majoritarian voice and legitimate minority interests, Socarras thoughtfully suggests that courts should not interfere with and neutralize the political nature of the legislative process "merely to satisfy their institutional interest in consistent rules for deciding cases."[429] This critic of the common law approach to the interpretation of legal texts concluded his argument by stating that "the debate on judicial modification of obsolete legal texts has proceeded with scant consideration for the more profound problems of separation of powers inherent in this new form of judicial review."[430]

While the distinct common law approaches to statutory interpretation offered by Calabresi and Pildes provide insight and material for reflection, the Socarras criticism makes a good deal of sense. After all, courts, like other interpreters, have the principal function of ascertaining meaning of legal texts, and not of substituting something, especially something conflicting, in lieu of their meaning.[431]

---

[426] Pildes, *supra* note 424, at 913.

[427] *Id.*

[428] Michael Socarras, Note, *Judicial Modification of Statutes: A Separation of Powers Defense of Legislative Inefficiency*, 4 YALE L. & POL'Y REV. 228, 250 (1985).

[429] *Id.* at 229. However, Courtney Simmons has pointed out the problems between compromises that take place during the enactment of legislation and the judicial search for "legislative purpose." Courtney Simmons, *Unmasking the Rhetoric of Purpose: The Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117 (1995).

[430] Socarras, *supra* note 428, at 250.

(8) Political Justification and Coherence

In chapter nine of *Law's Empire*,[432] Ronald Dworkin presented a sophisticated and comprehensive interpretative theory.[433] Dworkin relied on his fictional judge, Hercules,[434] to illustrate what Dworkin considers to be the better way of interpreting legal texts.[435] Hercules eschews divining the intent of legislators, individually and corporately.[436] Instead, the hypothetical, ideal judge is preoccupied with participating in the history of law-making which Dworkin roughly analogizes to the writing of a chain novel by different authors.[437] Judge Hercules also understands a statute's intent or purpose as "the upshot of integrity, of taking the interpretive attitude toward the political events that include the statute's enactment."[438]

---

[431] *See* Frankfurter, *supra* note 157, at 533.

[432] RONALD DWORKIN, LAW'S EMPIRE 426 (1986).

[433] Kent Greenawalt, Seminar in Legal Philosophy (Fall Semester, 1989).

[434] Judge Hercules is introduced in Ronald Dworkin, *Taking Rights Seriously*, where Dworkin describes Hercules as

> a lawyer of superhuman skill, learning, patience and acumen . . . [who] is a judge of some representative American jurisdiction. . . . [Hercules] accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts . . . that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar.

RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 105-06 (1977). It seems that Dworkin names his super-judge after Hercules, the character from ancient Greek mythology who was designated by the gods to be the greatest hero in the world. JOHN L. EMPRIERE, A CLASSICAL DICTIONARY (Buron Feldman & Robert D. Richardson, Jr., eds., Garland Pub. 1984) (1788). According to the Greek myth, Hercules performed great deeds of courage to help save people from numerous dangers. *Id.* He possessed extraordinary strength and dedication to his work. *Id.* He was made famous by performing twelve assignments (The Twelve Labors Of Hercules) which many thought impossible to achieve. *Id.* Throughout the legend, Hercules is revered for his virtue and piety. *Id.* He was admired by many ancients who viewed him as a person who dedicated his life to the common benefit of humanity. *Id.* The parallel between the Hercules of ancient Greek mythology and Dworkin's hypothetical judge becomes apparent.

[435] *See* DWORKIN, *supra* note 434, at 107-08. According to Dworkin, there are other ways of interpreting statutes, but Hercules's method is, if not the best, then certainly the better approach to interpretation. *Id.*

[436] *See* DWORKIN, *supra* note 432, at 316, 348.

[437] *Id.* at 228-32, 238-39, 313.

Crucial to Dworkin's theory of interpretation is that a judge, such as Hercules, can never resort to the originalist or legislative intent, fictional or otherwise, that may underlie a statute.[439] As Dworkin asserted: "A judge must ultimately rely on his own opinions in developing and applying a theory about how to read a statute. He cannot, without circularity, remit any part of that task to the legislature whose enactments he will use his theory to understand."[440]

Dworkin has assembled a continuum of the statute in which its application is not tied down to some moment in history defined as the intent of the legislature. For Dworkin, the construction of the text should be the interpretation of "history in motion."[441] Hercules's approach to interpretation illustrates the energy of this approach.[442] It "must be sensitive, that is, not only to his convictions about justice . . . but also to his convictions about the ideals of political integrity and fairness and procedural due process as these apply specifically to legislation in a democracy."[443]

While some facets of Dworkin's concept of interpretation are either abstract or utopian or both, what brings a sense of hope and practicality to it is his notion of law which he identifies as

---

[438] *Id.* at 316.

[439] *Id.* Dworkin introduces another fictional judge whom he calls "Hermes." *Id.* at 317. Judge Hermes is "almost as clever as Hercules and just as patient." *Id.* He also "accepts law as integrity." *Id.* However, Hermes adopts the "speaker's meaning" concept of legislative interpretation. *Id.* In essence, this is an intentionalist approach to interpretation which attempts to discover the "communicative will" of the legislators, i.e., it is an effort to discover what the legislators were thinking and saying and attempting to do when they passed the statute. *Id.* Dworkin thinks that Hermes' approach in finding the *speaker's meaning* is plagued by the problem: *whose intention counts*? *Id.* at 319. In my view, Hermes seems to be the more realistic judge. Hercules may be ideal, but he is also unreal.

[440] *Id.* at 334.

[441] *Id.* at 350.

[442] Research is the first component of Lonergan's method. Research is the process by which the interpreter collects and makes available the data that is relevant to the pursued inquiry—the meaning of the legal text. *See* Lonergan, *supra* note 14, at 127.

[443] DWORKIN, *supra* note 432, at 338.

> [a]n interpretive, self-reflective attitude addressed to politics in the broadest sense. . . . It . . . makes *each citizen* responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances . . . . Law's attitude is constructive: it aims, in the interpretive spirit, to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is, finally, a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction.[444]

In an earlier work,[445] Dworkin looked at the Supreme Court's interpretation of Title VII of the Civil Rights Act of 1964 in *United Steelworkers of America v. Weber*.[446] Dworkin concluded that the result obtained by the majority in *Weber* was correct.[447] The Court looked beyond the language of the statute and its legislative history and concluded that the voluntary preferential training program devised by Kaiser Aluminum did not violate Title VII. In citing *Church of the Holy Trinity*,[448] the majority concluded that the Kaiser plan, while not within the "letter of the statute," was within its spirit and the intention of its makers.[449] In support of his contention that the majority's interpretation and application of Title VII were correct, Dworkin submitted that "the question of how Title VII should be interpreted cannot be answered simply by staring at the words Congress used."[450] He contended that a proper interpretation of Title VII cannot be achieved by looking at the purpose of the statute as defined by the intention of its makers.[451]

---

[444] *Id.* at 413 (emphasis added). The Dworkin concept of statutory interpretation has some parallel to Aleinikoff's nautical approach (boat sailing v. chain novel writing). *See* Aleinikoff, *supra* note 12, at 47 n.117.

[445] RONALD DWORKIN, A MATTER OF PRINCIPLE (1985).

[446] 443 U.S. 193 (1979). There seem to be some parallels between the Dworkin concept of interpretation as applied to *Weber* and the contextualist approach identified by Aleinikoff, *see supra* note 12, at 46-47; Eskridge, *supra* note 12, at 1479 n.1, 1482, and 1549-54 (noting similarities as well as differences between Dworkin's principled approach and Eskridge's dynamic interpretation).

[447] DWORKIN, *supra* note 445, at 318.

[448] *See supra* note 271-85 and accompanying text.

[449] *Weber*, 443 U.S. at 201.

What validated the majority's opinion for Dworkin is its identification of and reliance on an underlying policy of Title VII: the amelioration of "the economic inferiority of blacks and other minorities."[452] The majority's interpretation reflects what Dworkin calls the "coherence theory" of statutory interpretation: "This supposes that a statute should be interpreted to advance the policies or principles that furnish the best political justification for the statute."[453] The questions posed but not completely answered by Dworkin are what is the best political justification and who determines it? Hercules? Every "reflective" citizen?[454]

In Dworkin's estimation, the preferable interpretation of the statute provides for its coherent development by cultivating "a more accurate or more sensitive or sounder analysis of [its] underlying moral principles."[455] In the *Weber* case this involved the active promotion of the economic equality of minorities.[456] The conflict between the two principal interpretations[457] given Title VII in *Weber* raises the issue of the indeterminacy of the statute.[458] Dworkin identified the indeterminacy with the question of whether Congress outlawed affirmative action or not. I understand Dworkin's resolution of the indeterminacy to be this: the majority answered the statute's open texture and filled in some of the gaps regarding the meaning of the statute not by displacing Congressional judgment to promote equal opportunity, but, rather, by supplementing it through upholding the remedial hiring plan developed by Kaiser.

---

[450] DWORKIN, *supra* note 445, at 318.

[451] *Id.* at 326-27.

[452] *Id.* at 327.

[453] *Id.*

[454] *Id.* at 413.

[455] *Id.* at 329.

[456] While acknowledging that Dworkin's approach has a contextualist component, Eskridge points out some of the difficulties he has with Dworkin's views on the interpretation of legislation. Eskridge, *supra* note 12, at 1550-54. Dworkin's emphasis on coherence, principled reason, and law-as-integrity seem to be particularly troublesome to Eskridge. *Id.*

[457] DWORKIN, *supra* note 445, at 324-27. Justice Brennan's majority opinion concentrates on the legality of temporary affirmative action programs that will bring the percentage of minority workers employed by private firms in line with the same percentage in the local labor force. *Id.* at 326-27. Justice Rehnquist's dissent is concerned with the fact that affirmative action programs prefer one group of people over other groups; preferences such as these are discriminatory and thus run counter to the literal requirements of Title VII. *Id.* at 324-26.

At this point I offer several comments about the gist of Dworkin's approach to statutory interpretation. First of all, Dworkin makes an important contribution to the development of American legal institutions by suggesting a "neo-natural law" approach for resolving contemporary public law issues.[459] Natural law theories emphasize what the law *ought to be* unlike positivist law views, such as H. L. A. Hart's, which regard the law as it is.[460] Judge Hercules's methodology of interpretation is permeated with searching for results that portray the law as it ought to be, not as it is. There are at least two problems with this approach taken by Hercules (Dworkin). The first is that Hercules as an ideal judge transcends the physical and intellectual abilities of real judges. This is not a criticism of the judiciary; rather, it is a recognition that our judges are real human beings, and Hercules is a fiction. Hercules is the ideal. Hermes (ironically named after a god of Greek mythology) is another fictitious judge, but his efforts seem to correspond to those of real judges, who do not possess the heroic or supernatural qualities of Hercules.

---

[458] GREENAWALT, *supra* note 51, at 145-48. Greenawalt offers some of the more helpful insight on this subject. For him, the determinacy of law refers to the extent to which it provides definite answers to legal issues. *Id.* The extent to which law cannot provide definite answers will predict its indeterminacy (lacunae in the law). *Id.* Greenawalt recognizes that what is determinate for one level of authority or interpreter, may not be for another level. *Id.* This author suggests that the law (and statutes which comprise a substantial portion of the law) can often provide determinate answers for most legal questions. *Id.* at 207-31.

[459] *See* Ronald A. Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165, 165-66 (1982).

[460] *See* Deryck Beyleveld & Roger Brownsword, *The Practical Difference Between Natural Law Theory And Legal Positivism*, 5 OXFORD J.L. STUD. 1, 3 (1985).

Second, the federal judiciary is limited in what it can do. Under Article III of the Constitution, judges have defined and limited grants of authority.[461] While our judges are the final authority who determine what the law is and is not, they must defer to the legislature and even the executive agencies on many issues. For example, the Supreme Court acknowledged that while the interpretations given by agencies to the legal texts they administer must be permissible interpretations, they do not have to be the best or the "right" interpretation.[462]

Yet some judges struggle for the best or right interpretation of the legal text which is at the center of the dispute they must judge. Again, I return to the case of *Riggs v. Palmer* discussed earlier in the examination of the equity or common law of statutes.[463] To reiterate quickly, sixteen-year old Elmer Palmer killed his grandfather in order to accelerate the testamentary gift the latter had planned to give young Elmer.[464] The majority of the New York Court of Appeals sensibly acknowledged that the state legislature in enacting the revocation of wills statute most likely intended that donees named in wills should take the property designated as their gift under the terms of the instrument.[465] Moreover, it was most likely the goal or the purpose of the statute to first, enable individuals to plan for the disposal of their property when they die and, second, to honor these specified wishes after the person's death.[466] But the court's majority speculated about what the purpose of the law should be and what the legislators may have intended if they had considered the facts of a beneficiary, such as Elmer, taking the life of the testator in order to accelerate the receipt of the gift.[467]

---

[461] U.S. CONST. art. III.

[462] *See* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984); *see also* Richard J. Pierce, Chevron *And Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301, 303-04 (1988) (examining how Congress delegates authority to agencies to make policy decisions consistent with their administrative responsibilities and suggesting that agencies should have considerable flexibility in defining and implementing policies that are covered by statute). Justice Scalia takes a different approach. He states that when Congress intends a particular result but is not clear about expressing this result in the language of the statute, this presents a question of law that is to be resolved by the courts, not by the agencies. Scalia, *supra* note 101, at 516. However, when there is no particular Congressional intent and Congress meant to leave resolution of policy issues to the agencies, then the only issue that would concern a reviewing court in this type of case is whether the agency acted properly within the scope of its discretion. *Id.* For a very helpful investigation of the disjunction between agency and judicial interpretation, see Bernard Bell, *Using Statutory Interpretation to Improve the Legislative Process: Can It Be Done in the Post-*Chevron *Era?*, 13 J. L & POL. 105 (1997).

[463] *See supra* notes 398-400 and accompanying text.

[464] Riggs v. Palmer, 22 N.E. 188, 188-89 (N.Y. 1889).

Indeed, the members of the court were principled people. I doubt that any of them would countenance Elmer's scheme. After all, it would seem to be their responsibility to ensure that crime does not pay insofar as the law provides, and, in part, it did. As the dissent points out, Elmer was punished with the criminal penalties provided by the law for the commission of homicide.[468] However, it is unwise to conclude that the majority reached its decision by interpreting the statute. The text simply did not apply to the circumstances of Elmer's taking his grandfather's life. The revocation statute was explicit about the grounds for invalidation, and murder was not one of them. This is not to say that the law will tolerate the devices of one "who murdered his ancestor that he might speedily come into the possession of his estate."[469] Perhaps the court would have been on firmer ground by not referring to the statute, although that seemed to be part of Elmer's case when he sought the bequest. The court could not ignore the case because Elmer and his aunts, the remainder beneficiaries who would receive the gift intended for Elmer if he should die underage and unmarried and without surviving children,[470] were in dispute over whether he or his aunts were entitled to the bulk of the estate. But, how to decide? The prudent and more fruitful ground is by filling in the gaps in the law, which clearly existed here, with principled legal reasoning reflecting the moral underpinnings of the civil and criminal law, not by interpreting a statute which did not apply to the controversy at hand.

---

[465] *Riggs*, 22 N.E. at 189.
[466] *Id.*
[467] *Id.*
[468] *Id.* at 192 (Gray, J., dissenting).
[469] *Id.* at 190.
[470] *Id.* at 188

Here I conclude my description and evaluation of the variety of approaches used to interpret public legal texts. It appears that the approaches to interpretation examined to this point all have something to contribute in the discernment of what normative legal texts mean. However, as has also been seen, each of these interpretive approaches by themselves have shortcomings which limit the effectiveness of their application. In recognition of these limitations, I now propose the work out the fundamental details of method in interpretation to which I alluded earlier in this essay.

III. A SYNTHESIS: METHOD IN INTERPRETATION

In preparation for developing the coherent method in interpretation, I shall once again return to the park ordinance hypothetical. The motivation for this is to ascertain whether the concepts of interpretation examined earlier are the only ways to approach the construction of legal texts, particularly when it comes to "hard cases."[471] As we have seen, the temporal and factual contexts can often be crucial to comprehending and explaining the meaning of legal texts such as the park ordinance in a variety of cases. As serious interpreters who strive to perfect our individual and communal understanding of normative texts, we begin to see that comprehension of the context of application helps determine the field in which the interpretation and application of the text are to take place. In preparation of the reexamination of the ordinance as a way of developing method in interpretation, I briefly turn to the insights of Hans-Georg Gadamer and his work on interpretation.

Gadamer made a major contribution to the science of interpretation (largely in the context of theology and philosophy) that has much to offer those engaged in legal interpretation.[472] His work elaborated and investigated the position advanced by R.G. Collingwood: "We can understand a text only when we have understood the question to which it is an answer."[473] Interpretation for Gadamer is a project that requires the interpreter to understand the content of the language, the author, the times in which the author wrote (which most likely had an impact on why the text was written), and how it has been understood throughout its interpretive history.

---

[471] Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1057 (1975) (using term to describe and discuss difficult cases presenting more difficult challenges of statutory interpretation and resolution).

Gadamer focused his study of interpretation on the construction of an hermeneutical method. He began his investigation with the premise that each person, as interpreter, approaches the subject of the interpretation with personal prejudices.[474] For Gadamer, prejudices are not negative or undesirable if they are viewed as the beginning point in each person's interpretation of a text previously written by another.[475] Prejudices are conditions of understanding, and they are the point at which the interpreter contributes one's self to the dialectal process of understanding.[476] Gadamer noted that prejudice is personal understanding, but it is "*less of a subjective act than as participating in an event of tradition*, a process of transmission in which past and present are constantly mediated."[477] Like Dworkin's understanding of interpretation as "history in motion,"[478] there is for Gadamer an engagement between the interpreter and the examined text that brings the two together in the hermeneutical circle, that is, the "interplay of the movement of the tradition and the movement of the interpreter."[479] As with Dworkin, the meaning of the text under Gadamer's method cannot be wedded to the intent of the drafter, for a text's meaning transcends its author. But, unlike Dworkin, Gadamer understood interpretation to be both a reproductive as well as a productive activity.[480] The horizon of the author and the horizon of the interpreter consequently fuse through a dialectical process and simultaneously become the meaning of the text and its understanding by the interpreter.[481]

---

[472] *See* HANS-GEORG GADAMER, TRUTH AND METHOD 265-369 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed. (1989)). My appropriation of Gadamer's work on interpretation and application to legal interpretation is not unique. *See, e.g.,* William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609, 612 (1990).

[473] GADAMER, *supra* note 472, at 370.

[474] *Id.* at 276-77.

[475] *Id.* at 270-71.

[476] *Id.* at 294-96.

[477] *Id.* at 290 (italics in original).

[478] *See* DWORKIN, *supra* note 445, at 350. Gadamer takes a somewhat different, but not incompatible, approach when he states: "Someone who is seeking to understand the correct meaning of a law must first know the original one." See GADAMER, *supra* note 472, at 326.

Gadamer specifically acknowledged that his method of interpretation could have concrete application to legal interpretation. As he stated:

> In both legal and theological hermeneutics there is an essential tension between the fixed text—the law or the gospel—on the one hand and, on the other, the sense arrived at by apply-

---

[479] *Id.* at 293.

[480] *Id.* at 296. Gadamer refines this point for the judicial interpreter when he argues:

> It is true that the jurist is always concerned with the law itself, but he determines its normative content in regard to the given case to which it is to be applied. In order to determine this content exactly, it is necessary to have historical knowledge of the original meaning . . . . But he cannot let himself be bound by what, say, an account of the parliamentary proceedings tell him about the intentions of those who first passed the law. Rather, he has to take account of the change in circumstances and hence define afresh the normative function of the law . . . . Historical knowledge can be gained only by seeing the past in its continuity with the present—which is exactly what the jurist does in his practical, normative work of "ensuring the unbroken continuance of law and preserving the tradition of the legal idea." *Id.* at 326-27 (citation omitted).

Dworkin criticizes the historical approach and eschews what he calls "speaker's meaning." *See* DWORKIN, *supra* note 432, at 314-17.

[481] A useful perspective on the significant contribution of dialectic to investigating the meaning of a text was advanced by Paul Ricoeur. *See* PAUL RICOUEUR, HERMENEUTICS & THE HUMAN SCIENCES 185, (John B. Thompson Trans., Cambridge University Press, 1981). Ricoeur was interested in developing a "new dialectic" which would provide an "objectification of meaning" as a "necessary mediation" between the author and the subsequent reader. *Id.* This mediation

> calls for a complementary act of a more existential character which I shall call the appropriation of meaning. "Appropriation". . . means "to make one's own" what was initially "alien" . . . . Appropriation is thus a dialectical concept: the counterpart of the timeless distanciation implied by any literary or textual criticism of an anti-historicist character.

Id.

> ing it at the concrete moment of interpretation, either in judgment or in preaching. A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted . . . . This implies that the text, whether law or gospel, if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application.[482]

Ultimately, the success of interpretation for Gadamer is dependent on the success of the dialogue between the interpreter and the text. The successful interpretation is not one where the interpreter and his prejudices prevail, but rather, where the text and interpreter become something that they were not before the hermeneutical process began—as Gadamer says: "To reach an understanding in a dialogue is. . . [to be] transformed into a communion in which we do not remain what we were."[483]

With Gadamer's thoughts in mind, let me construct the method in interpretation that I propose by synthesizing the previous methods of interpretation in the structure of Lonergan's eightfold division. In doing this, I return to the difficult case involving the elderly woman who enters the park on her motorized wheelchair. She is mindful of the park ordinance, but she is also someone who has enjoyed the use of this park since she was a small child. Her parents used to bring her to the park when she was a toddler, and she possesses many fond memories of romping around the vast expanses of the park. As she became older, she would walk through the park to and from school. After high school, she and her boyfriend would stroll through the park on many weekends. They were subsequently engaged and married. In the years to come as husband and wife, they brought their own children to play in this park sharing many a picnic and many a sporting event. After numerous happy years of enjoying this park with her husband and family, she now comes here often by herself to recollect and savor memories of the past. Her husband recently died, and most of her children and grandchildren have moved away. But she comes back day after day to recreate and reflect upon the past. These visits are both comforting and therapeutic. Besides, she is able to see many others doing exactly what she and her family did for so long.

---

[482] GADAMER, *supra* note 472, at 308-09. On the application of the legal interpretation, Gadamer continued:

> To distinguish between a normative function and a cognitive one is to separate what clearly belong together. The meaning of a law that emerges in its normative application is fundamentally no different from the meaning reached in understanding a text . . . . To interpret the law's will or the promises of God is clearly not a form of domination but of service. They are interpretations—which includes application—in the service of what is considered valid. Our thesis is that historical hermeneutics too has a task of application to perform, because it too serves applicable meaning, in that it explicitly and consciously bridges the temporal distance that separates the interpreter from the text and overcomes the alienation of meaning that the text has undergone.

Id. at 311.

[483] *Id.* at 379.

When it was no longer possible for her to walk because of her age and infirmities, friends would drive her to the outskirts of the park so she could see it from its perimeter. However, that was unsatisfactory, so she and her children discovered that with a motorized wheelchair she could have the community senior citizens van pick her and her wheelchair up at home and take her to the park for an hour or two each day when the weather permitted. She did this for several weeks until one day a foot patrol officer met her in the park as she was operating her wheelchair. The officer issued her a citation specifying a violation of the ordinance prohibiting motor vehicles in the park. There was no dispute between the woman, her lawyer, and the prosecutor about the facts. However, there was a strong disagreement, given the facts of the case, about whether the ordinance applied to motorized wheelchairs and those who must rely on them to get around. The case proceeds to trial. The principal legal question before the judge was whether the ordinance applied to the woman and her wheelchair.

The judge—I shall call her Portia as I did in my earlier writing—is committed to interpreting the ordinance and deciding this case in the best way possible. Her goal is to reach the best understanding of the meaning of this legal text in the context of this case. She has always been interested in legal interpretation and is therefore familiar with the variety of ways in which legal texts can be interpreted and applied. She has great sympathy for the elderly woman and understands the legal issues that confront her. On the other hand, she appreciates the need for the ordinance and the protection it offers the community. At a preliminary hearing, the police inform her that the wheelchair operator exercised reasonable caution at all times while she maneuvered her wheelchair in the park. They do not contest the woman's account that she came to the park with her wheelchair so that she could both recreate and reminisce.

The heart of the controversy seems to be this: how will Portia ascertain the meaning of the ordinance which best relates to the facts of this case? How, if at all, does this statute apply to the wheelchair operator's activity? The judge begins to examine this case in the context of the different methods of interpretation previously investigated. Portia is familiar with Dworkin's Judge Hercules and, like Hercules, she wants to achieve the best interpretation possible. But, unlike Hercules, her approach is different. She begins with Felix Frankfurter's three-part rule of interpretation concerning statutes: read the text; read the text; read the text.[484] As a result of following Frankfurter's advice, she begins her research with the plain meaning approach.[485] In doing so, the judge commences her foray into data collecting—the data here being the text "all motor vehicles are prohibited from the park." She understands how easy it would be to conclude quickly that the wheelchair operator's action falls within the prohibition of the literal meaning of the statute: by directing her self-propelled wheelchair through the park, the woman violated the ordinance. From an examination of the plain or ordinary meaning of motor vehicle, another component of research which requires the judge to formulate a basic comprehension of how the legal and lay communities understand the meaning of important terms like "motor vehicle," Portia concludes—after some preliminary research using dictionaries and other tools such as judicial precedent defining the term "motor vehicle"—that a motor vehicle is a self-propelled mechanical conveyance designed to transport people or commodities from one point to another.

---

[484] Judge Friendly once reported that when Justice Frankfurter was still teaching, he urged his students to follow a three-pronged rule for statutory interpretation: (1) read the statute; (2) read the statute; and, (3) read the statute. *See* HENRY J. FRIENDLY, BENCHMARKS 202 (1967). In his own words, Justice Frankfurter offered this insight: "Though we may not end with the words in construing a disputed statute, one certainly begins there. You have a right to think that a hoary platitude, but it is a platitude not acted upon in many arguments. . . . [L]isten attentively to what a statute says. One must also listen attentively to what it does not say." Frankfurter, *supra* note 157, at 535-36.

[485] Research is the first component of Lonergan's method. *See* Lonergan, *supra* note 14, at 127. Research is the process by which the interpreter collects and makes available the data that is relevant to the pursued inquiry—the meaning of the legal text. *Id.*

In pursuing her initial research into the plain meaning of the text, Portia also uncovers some past judicial interpretation concerning the meaning of "motor vehicles" and other legal efforts to regulate them. Her research continues and leads her to consider other texts and the textualist interpretive approach. She discovers that there have been other statutes and regulatory programs which shed some light on this case. For example, Portia is aware that other judges have had to make determinations on whether bicycles, tractors, mopeds, etc. are motor vehicles subject to government regulation.[486] Her research leads her to an introduction to the second division of Lonergan's approach which is "interpretation."[487] Portia begins to realize that in order to ultimately reach the soundest interpretation of the ordinance in this case, she must first appreciate the boundaries of the text's meaning—she must, in other words, establish appropriate limitations on the flexibility or malleability of the text. She realizes that her research and initial understanding of the text's prohibition developed up to this point might very well apply to the motorized wheelchair. The wheelchair operator's actions seemingly violated the literal meaning of the ordinance as well as its meaning in relation to other texts. She has discovered that other normative texts—be they statute or judicial interpretation exempting other conveyances such as safety vehicles—do not appear to extend to the wheelchair and the purposes for which it was brought into the park. Portia concludes that a textualist approach does not help the elderly woman, and she is troubled by this result. Portia questions whether the authors of the ordinance ever intended to apply the regulation to motorized wheelchairs and infirmed individuals who must use them in order to get around. She accordingly turns to an intentionalist approach to ascertain the ordinance's meaning.

---

[486] *See supra* note 54.

[487] Lonergan, *supra* note 14, at 127. Lonergan's view of "interpretation" is essentially "grasping" the meaning of what is being examined in its "proper historical context, in accord with its proper mode and level of thought and expression, in the light of the circumstances and intention of the writer." *Id.* Of course, this second component of the Lonerganian method surfaces throughout the interpretative approach which I shall develop. At this stage of researching and discerning of texts, the interpreter becomes conscious of the need to reach out beyond the self, to become "intersubjective"—as Lonergan would say—and see that one, as the interpreter, intersects with author, texts, and other interpreters. *Id.* As Lonergan explains, this is the exegetical component where the interpreter must get some preliminary understanding of the text and then judge how correct one's understanding of the text is. *Id.* at 155. There must consequently be an appreciation of the meaning of ordinary or plain meaning which is shared by the author,

Here, she engages in more research, this time historical, to determine if the legislative body had some general intent underlying the enactment of the ordinance. History is the third Lonerganian division which conveys the essential background story to the interpreter who can see more clearly the "who," the "what," the "when," and the "where" that are involved in the exercise before the legal interpreter.[488] Her analysis of the legislative record reveals some information about the understanding which the authors had concerning the circumstances that led them to conclude there was a need to preclude motor vehicles from the park. The information she uncovers regarding authors' intent reveals the history of who was involved with the emergence of the ordinance (the teenage driver, the citizens who use the park, and the responding legislature); what was involved (the need to protect the conventional users of the park

---

the interpreter, and others. *Id.* at 158, 160.

[488] *See* Lonergan, *supra* note 14, at 128.

from large motor vehicles taking over the paths and endangering the pedestrians, joggers, and bicyclists); and the when (those times in which traditional users of the park are on the premises) and the where (the pathways of the park). Unlike the case involving the ambulance which entered the park to assist a person who needed emergency medical help, the woman's wheelchair was not in the park for the same reason. The wheelchair-bound woman was in the park to drive, to "stroll" along the paths for purposes of recreation and reliving her past. It is unclear if the woman's being in the park with her wheelchair was the sort of activity that fits within the traditional uses of the park. Since the judge's research reveals that the motorized wheelchair is similar to automobiles in the sense that both are mechanically self-propelled and are designed to move people, it seems logical that the presence of the motorized wheelchair in the park is prohibited by the authors' intention that underlies the ordinance. Pedestrians, bicyclists, and joggers informed the police that while they did not have to leap out of the way of the woman and her wheelchair, they had to avoid the woman as she drove through the park. By itself, the intentionalist approach does not reveal all the answers to Portia's questions.

She now turns to see what broad purpose might underlie the statute. Again, Portia turns to history, to initial interpretation, and to research for assistance. Upon completion of her analysis and reflection of these tools, she concludes that the goals to be achieved by the ordinance are to stop those activities in which motorized conveyances are in competition with pedestrians, bicyclists, and joggers—the traditional users of the park. Unlike the motorist whose car broke down and who parked his car on the edge of the park to get it off the busy street, the operation of the motorized wheelchair appeared to be in competition with the other users of the park who were pursuing their "normal" activities on the paths. While the presence and movement of the wheelchair was not as threatening as the teenage joy-rider, the wheelchair's presence prompted the conventional users to alter their activities in order to avoid the moving obstruction presented by the motorized wheelchair.

As with the previous interpretive methods, the purposive approach by itself does not provide the judge with the best meaning of the ordinance that recognizes the significance of the elderly woman's action.

Portia accepts the likelihood that the drafters of the ordinance never considered the circumstances of an infirm individual driving a motorized wheelchair across the park. As was noted in the motorized wheelchair case from Kentucky,[489] the legislators who amended the state motor vehicle code stated that they never contemplated applying the driving-under-the-influence provisions to self-propelled wheelchairs and their operators.[490] But the fact that this was never envisioned by the authors does not preclude application of the statute to a situation unforeseen at the time of its enactment. The issue of whether the wheelchair is covered by the ordinance or not may be answered under a contextual approach. Portia acknowledges that the interpretation of the ordinance must concentrate on the context of the present time rather than some time in the past. However, the meaning of the law in the contemporary context must be built upon and coherently follow the understanding of the law as understood in the past, i.e., the context surrounding the text's drafting and enactment along with the history of interpretation that has evolved since enactment. As a diligent interpreter of the present moment, Portia realizes that a better approach to interpretation needs a dialectic.[491] Here, Portia, along with the rest of us, can learn something from both

---

[489] *See supra* note 54 and accompanying text.

[490] *Id.*

[491] See Lonergan, *supra* note 14, at 245, where the author develops his theory of the intersection of horizons: those of the present interpreter along with those of the author of the text, the text itself and previous interpreters. Dialectic enables the interpreter to overcome the deficiencies of research, history, and interpretation (the first three divisions of his method), by adding

> to the history that grasps what was going forward a history that evaluates achievements, that discerns good and evil . . . . There are . . . the gross differences due to the fact that historians with opposed horizons are endeavoring to make intelligible to themselves the same sequence of events. With such gross differences dialectic is concerned.

Id. at 245-46.

Gadamer and Lonergan regarding the dialectical process. The horizon, the background, the perspective of the present interpreter must appreciate that the context of the norm's application in terms of the context in which the author's wrote the norm. Dialectic is, according to Lonergan, a synthesis of the concrete, the dynamic, and the contradictory.[492] Dialectic provides the framework within which the contemporary interpreter like Portia engages the past—the past that consists of the author, the text, and the judge's predecessors who have tackled the text to determine its meaning. As she enters the vineyard of her labor, she must remain conscious that there are those who have preceded her in turning over the soil of the text. She comprehends that the legal text is given meaning by looking at the needs of the society both at the time the ordinance was written as well as the time of its application. But today, especially with the dynamic methods of interpretation, the emphasis, sometimes exclusively, is only on the context of the application without regard to the context of enactment or the contexts of intervening judicial interpretation. If the context of application eclipses, as it seems, the context of enactment, as well as the contexts of intervening periods between enactment and application, Portia might conclude that, even though her understanding of the statute has grown since she began her investigation, there remain problems in finding the most accurate meaning of the ordinance which can help the elderly woman out of her dilemma. Even though the contextualist or dynamic method of interpretation is more expansive and flexible than some of the others, it still does not permit the judge to view the law from the perspective of the infirm wheelchair operator. The presence of the motorized wheelchair still interferes with the traditional users of the park. Even in the contextualist framework, the woman who operated the wheelchair seems to have violated the ordinance.

Use of interpretive canons does not supply any assistance to the judge. As mentioned earlier, the canons compete and conflict with one another. Here, the judge is confronted with one canon telling her that a remedial statute, such as the ordinance, is to be liberally construed. Since this construction would most likely prefer protecting the traditional users of the park, the judge could easily find that the woman's conduct falls within the scope of the statute and therefore would be prohibited. However, the ordinance is also penal in nature. According to another canon, it is to be strictly construed. Since the woman was engaged in an activity that parallels that of most of the other users and occupants, i.e., recreation, she was not engaged in an activity prohibited by the ordinance if strictly construed. Portia incrementally perceives a reason compelling the application of this second canon. The woman's activity is not very different from the park users who are jogging, bicycling, or walking. But how does she elect between these competing canons? In the final analysis, the judge concludes that the canons afford her little help in this case. One canon (remedial statutes are to be liberally construed) neutralizes another (penal statutes are to be strictly read).

---

[492] *Id.* at 129.

But might there be something in a common law approach to interpreting this ordinance? Unlike the situation in *Moragne* where there was no statute on point, there is a specific statute which addresses the woman's case. There are no grounds for suggesting that the judge could reason from other legal texts to arrive at a disposition of this case. Moreover, there would be no grounds to apply Judge Calabresi's doctrine of overriding "anachronistic" legal texts because this ordinance is contemporary and protects important interests of current users of the park. But there is some reason for still drawing from the common law or equity-of-the-text approach. The text has been generally understood to protect users of the park from the potential dangers of self-propelled motor vehicles from colliding with and injuring those present who are not enclosed in and propelled by a mechanized vehicle. However, Portia also recognizes that a corpus of interpretive precedent has evolved over time in which the text has been interpreted to exclude certain kinds of motor vehicles (e.g., fire trucks, ambulances, police cars, and service vehicles) from its coverage. This developing body of understanding formulates a set of doctrines (expressed as judgments about facts and value)[493] reminding Portia that this, like other laws, is about something important—the care and protection of members of the community. The text as norm grants instruction and sanction demonstrating how our conduct affects not only the self but others as well. The evolution of the legal doctrines surrounding any normative text, including this ordinance, guides citizens by illustrating what sort of conduct is permitted or encouraged and which is not. These doctrines are like Lonergan's expressions of judgments about facts and values: here are the kinds of conduct (facts) we consider to be acceptable or unacceptable under the normative text and here are the justifications (values) supporting the conclusions that distinguish acceptable from unacceptable conduct. Although Portia has obtained further insight into the meaning of the ordinance, she is not satisfied that she has acquired the best meaning of the text.

She considers application of Dworkin's principled interpretation. The attractive quality of this approach is its central concern with justification of the conclusion. By applying Dworkin's principled approach, the preferred interpretation of a statute will furnish the best political justification of the statute. Inextricably related to the political justification is the cultivation of the underlying "moral" principles of the statute.[494] But what is moral for Dworkin does not necessarily coincide with the conventional understanding of distinguishing between right and wrong actions and preferring the right over the wrong. As he explains in his most recent work, *Freedom's Law: A Moral Reading of the Constitution*, "the moral reading" requires judges, lawyers, and interested citizens to interpret and apply "abstract clauses on the understanding that they invoke moral principles about political decency and justice."[495] But what is the moral reading for Dworkin? He suggests that it is not revolutionary but a conventional "coherent strategy" which judges and lawyers typically use.[496] It seems that Dworkin's notion of the moral reading is founded on general principles of liberty and equality that "commit" the American people to political and legal "ideals" in which the state must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document, such as the freedom of speech and religion.[497] Yet Dworkin argues that the moral reading which he favors is generally represented by "liberal" justices of the Supreme Court with whom he generally agrees rather than more "conservative" justices with whom he is less likely to agree.[498] This, Portia might argue, is not morality but political choice. Morality and moral judgment, once again, are founded on making distinctions between right and wrong (between good and evil as Aquinas points out in the First Principle[499]) and choosing the right over the wrong, regardless of whether one is politically conservative or liberal.[500]

---

[493] *Id.* at 132.

[494] *See* DWORKIN, *supra* note 432, at 329.

[495] RONALD DWORKIN, THE MORAL READING OF THE CONSTITUTION 2 (1996).

With this in mind, Portia returns to her principled interpretation of the ordinance. Her task is two-fold. She must first determine what interpretation will satisfy the best political justification of the statute. In doing so, she looks for the policy or policies which seem to be at the heart of the ordinance. A reasonable conclusion about this facet of the principled interpretation is that the ordinance should be enforced to protect the users of the park. After all, the ordinance came about because the traditional users of the park were threatened by a youngster driving through the park for entertainment that endangered or could endanger the strollers, bicyclists, and joggers. The best political justification for interpreting and applying this statute is taking whatever action is necessary to continue to protect the traditional users from material threats posed by the presence of motor vehicles in the park.

---

[496] *Id.*

[497] *Id.* at 7-8.

[498] *Id.* at 37-38.

[499] *See* AQUINAS, *supra* note 18.

[500] McConnell, *supra* note 30, at 3. Dworkin appears to concede that "conservative" as well as "liberal" judges can take a moral stand in exercising their office. *Id.*

In looking at the woman's case, there is no question that the presence and operation of the wheelchair could inconvenience and possibly endanger some of the traditional users of the park who were present at the time of the alleged violation. *A fortiori*, the best political justification of the statute mandates exclusion of motor vehicles, including the woman's wheelchair which posed potentially dangerous encounters with bicyclists and joggers in the park.

However, the judge's inquiry based on the principled approach does not stop here. She must now address the second issue of the principled method, i.e., what constitutes the underlying moral principles in this case? Although the underlying moral principle is distinct from the best political result, it is related to it. A brief reference to the *Weber* case illustrates the nexus between political justification and moral principles. The political justification or policy for Title VII was to take action necessary to insure equality for all citizens. The moral principle underlying this policy was to make sure that racial minorities, who had long-suffered discrimination, were placed on a level of economic equality with individuals who already enjoyed the economic opportunities offered by the employer. The tool which would cultivate this moral principle was the development of temporary affirmative action programs that would place those people who had been disadvantaged on a level of equality with those who had enjoyed the opportunity for promotions into the training programs.

Returning to the woman's case with this analysis, Portia can identify as the best political justification (or policy) for the ordinance the taking of steps to protect the traditional users from the dangers of motor vehicles operating in the park. The underlying political considerations and policies are devoid of any thought about elderly, infirmed citizens who need motorized equipment that is essential for them if they are to exercise independence, like most other citizens, when they wish to enjoy the park's facilities. The moral principle related to this political justification very likely converges on the fact that the traditional users do not pose threats to one another's use of the park. However, the presence of motor vehicles, or bulky, slow moving motorized wheelchairs, operating within the park would not only compete with the traditional users, but would also endanger them. The means of cultivating the moral principle would include the enforcement of the ordinance against all who operate motor vehicles in the park regardless of their reasons for having their vehicles in the park.

When all is said and done, the judge's reliance on the principled method of interpretation leads to the same result as her use of the other methods of interpretation: the woman had a type of motor vehicle in the park, and this activity apparently fits within the prohibition that is warranted by the best political justification. The reasons for the wheelchair being in the park have little, if any, relevance to these approaches to interpreting and applying the ordinance.

Is there any other means of interpreting the ordinance which might exculpate the elderly woman for having her motorized wheelchair in the park? Is there some way of construing the ordinance which can justify and allow the conduct of the woman? Portia is confident that there is. This approach relies on all those investigated up to this point. It is a synthetic approach to legal interpretation that begins with the specific and related legal texts. It then draws from intention of the authors, and the first, or original, interpreters by examining the history of the text as evidenced by the writings and debates of the authors and their contemporary commentators. In essence, a subsequent interpreter such as Portia acquires insight into the understandings and thinking of those present at and responsible for the conception of the text. History also is relied on to plot out the reasons for that statute and the goals it was designed to achieve. Purpose, as Llewellyn argues, is crucial to the creation and understanding of a normative text, because "merely declaring a rule, with no purpose or objective, is nonsense."[501] Perhaps the best way of describing method in interpretation is to say that, while it draws from the other approaches identified earlier in this essay, it asks the interpreter to exercise common sense in understanding what a statute means in a given factual context. Yet, it has a relationship with the other methods in that it borrows interpretive tools from the textual, intentional and originalist, purposive, contextual, the reasoning tools of the common law, and principled approaches. But it also integrates new elements that have origins in Lonergan's approach.

Portia sees not only usefulness but the necessity of research, preliminary interpretation, history, dialectic, and doctrinal development. These Lonerganian elements have already been applied by Portia on a piecemeal basis when she individually examined the conventional methods of interpretation and their application to the woman's case. She also appreciates that with these tools or divisions in the Lonerganian approach come systematics—the working out of appropriate systems of conceptualization concerning what is at the heart of the legal norm so that future interpreters can rely on the work of their predecessors.[502] The aim of the system of concepts, the goal of systematics, is to make progress toward and achieve understanding for the self and for others.[503] Doctrine and systematics work hand in hand seeking truth and understanding. Doctrine aims at clear understanding of the truth of the text; systematics seeks understanding of the realities that are affirmed by doctrines.[504] At this point, Portia has reached understanding by integrating the insightful contributions of the variety of legal methods as refined by the Lonerganian approach. But what does she do now? She observes parallels as well as conflict amongst the individual methods. She draws together the parallels that provide a coherent understanding of the normative text in the case of the elderly woman. Now, she is prepared to communicate the understanding she has consummated. Communication is the act of external relations; the engagement of one interpreter with others.[505] Be the medium Portia uses that of oral conversation or written opinion writing, she engages others so that her understanding of the law's meaning is brought to other people. The communication is not passive, it is active. It serves as a catalyst to bring others into the process of the discernment of the normative text's object. They, in turn communicate with her. Portia's work has been a catalyst that triggers others (here, the prosecutor, the woman and her counsel) to participate in the same process she has pursued. Let me demonstrate this approach in the example involving the Portia and the case of the elderly woman.

---

[501] Llewellyn, *supra* note 267, at 400.

[502] Lonergan, *supra* note 14, at 132.

[503] *Id.* at 340.

[504] *Id.* at 349.

As with the plain meaning and textual approaches, the method which Portia tests begins by looking at not only the specific statute involved but also the general corpus of ordinances and other applicable rules (not all of them promulgated by the town council) relating to the operation of motor vehicles, including those cases in which the law grants exemptions or privileged status to particular kinds of conduct which are excused from the general regulation. Portia acknowledges a relationship between the woman's recreational activity and the operation of the ambulance in the park which I concluded earlier was not prohibited by the ordinance. Research, initial interpretation, history, and dialectic are blended into the synthesis or reading together of these traditional interpretive approaches.

Next, the judge scrutinizes the important purposes validating the park ordinance along with the purposes motivating the woman to enter the park for her stroll. By undertaking this kind of investigation, the interpreter becomes sensitive to the overall landscape of the purposes of regulating individuals' conduct as such conduct may be regulated by the normative legal text.[506] The judge also identifies other purposes which may compete with those supporting the regulation of the presence of motor vehicles in the park but which contain important values that society wants to protect and foster too, e.g., enabling a class of citizens who cannot walk, bike, or jog to enjoy the park nevertheless.

---

[505] *Id.* at 132.

[506] *See supra* note 47 and accompanying text. The facts of the applicable case are significant to any statutory interpretation. *See also* William N. Eskridge, Jr. & Philip F. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L.

The synthetic approach also draws from contextualism by opening the interpreter's inquiry to the needs of the society at the time the statute is applied in addition to those at the time the law was enacted. By incorporating these contextual components in her evaluation of the case of the elderly woman, Portia makes an important discovery: when the statute was enacted, the community needed to be protected from certain competing users of the park, viz. operators of large, heavy, fast-moving motor vehicles. However, at the time of enforcement, there is another important societal need which was not considered by the town council when the statute was enacted. This additional need might be the recreational interests of classes of citizens, like the wheelchair-bound senior, who wish to recreate with their fellow citizens in a manner that does not challenge any other user such as a bicyclist, jogger, roller-skater, or pedestrian. While retaining research, initial interpretation, history, and dialectic, Portia also harmonizes judgments of the facts and underlying values (doctrine) discovered so far and begins to develop a united concept (systematics). Since most members of society can walk to the park and stroll or run or bike around it (a judgment of facts and values), it would seem only fair to those who are physically incapacitated and confined to self-propelled wheelchairs to be entitled to do similar things (a conceptualization).

The synthetic technique also relies on the methodology of the principled approach. It examines and evaluates the policy or policies underlying the statute as well as the moral principles which guide the synthetic interpretation within a particular factual context. The synthetic approach relies heavily on the facts of the specific cases to guide the development of the meaning and the application of the statute by looking at all the

---

REV. 321, 347 (1990).

policies which deal with the statute's subject matter (some of which may compete) and other moral principles (more judgments about facts and values). There can be a tendency in a more strict principled approach for the interpreter to emphasize principles and policies and to de-emphasize facts. The inherent danger of this practice is that the principled approach can emphasize abstract principles and de-emphasize facts. In other words, the approach can reify the principle and ignore the facts. The facts might then become unimportant to the interpretation of the statute.

The point here is that the facts surrounding the elderly woman's case which include the reasons for doing what she did, and the desire on the woman's part to be more like her fellow citizens who could enjoy the park's facilities, have a bearing on what the law means and does not. These facts illustrate that she was simply trying to use the park in a fashion consistent with rather than in competition to the basic principle of keeping motor vehicles from operating in the park. The conceptualization that Portia has been building is now in a shape that can be communicated to those others involved in the litigation.

With communication and engagement with the parties, the judge's principal job is to decide whether or not the woman violated the park ordinance. An inextricable element of this task is to determine the best meaning of the park ordinance whose terms generally prohibit, on their surface, the action pursued by the wheelchair-bound citizen. The judge, as official interpreter, is obliged to understand the language of the ordinance as well as the policies it was designed to promote. As we have seen from an earlier discussion,[507] the main policy underlying this ordinance is to protect the people who have traditionally used the park from the dangers posed by motor vehicles operating in this sanctuary. However, there are also simultaneously in operation other important public policies designed to foster the protection of the public.

One of these policies is to provide wholesome recreational activity for the townspeople. Thus, if pedestrians, bicyclists, joggers, and skaters can use the park for recreational purposes, it would be logical to conclude that a person who uses a mechanical device for recreational self-locomotion would not fall within the purview and prohibitions of the normative text. What the judge must do to interpret insightfully the ordinance is to reconcile the policies underlying the ordinance (protection of people in the park from the dangers of motor vehicles) with other competing policies.[508] Through her communicating with the concepts built on the judgments of facts and values discerned in this case, Portia also receives and takes account of the insights provided by the parties. By inferring that the woman's actions were more akin to the permissible recreational activities than to the prohibited joy-riding of the novice driver, Portia is in a position to resolve that the woman did not violate the park ordinance. The judge interprets the ordinance (and the policies it promotes) in light of all underlying policies. In reconciling the differences between competing policies, the judge reviews those policies in light of the factual context presented by the wheelchair operator. By doing this, the judge makes the different policies at stake within the text and the text's application cohere with one another.[509] The judge continues the work started by the authors of the normative text insofar as she explains what its most authentic meaning is in situations where reasonable people differ about the text's essential aim. The legislature promulgates laws generally promoting certain policies. The judge then implements these policies through an involved, yet still practical exercise that synthesizes conventional approaches through the Lonerganian framework.

---

[507] *See supra* Part II A.

---

[508] *See supra* note 391 and accompanying text.

[509] *See supra* note 391 and accompanying text. There are parallels between what the judge did in the case involving the doctor and what the Supreme Court attempted to do in *Bakke*. *See supra* note 215 and accompanying text. In *Bakke*, the Justices had to wrestle with the conflict between the general public policy that no person be discriminated against, or excluded from participation in a federally funded program, and the more particular policy of ending discrimination and exclusion of minorities, especially African-Americans. *See supra* note 231 and accompanying text.

By charting such a course, Portia and those concerned, as parties and citizens, arrive at the best meaning of the text that is humanly possible. By following this course, the work of the interpreter cultivates harmony between the final product (i.e., the interpretation) and the social blueprint (i.e., the normative text) that is the subject of the exercise in construction.[510] Unlike the other interpretive methods which were individually applied to the woman's case, the Lonerganian-modified synthetic approach enables the interpreter to conclude that the language of the ordinance means this: the woman's action of carefully and watchfully traversing the park in her wheelchair did not violate the important remedial principles that form the nucleus of the park ordinance. Therefore, her action is not of the sort that is regulated or prohibited by the ordinance.

IV. CONCLUSION

The American legal scene has produced a great quantity of scholarship and commentary over the last two decades on theories of legal interpretation. We who labor in the world of understanding the law and explaining its meaning to others have a diverse assortment of theories from which to choose. In contrast to 1958 when Henry Hart and Albert Sacks lamented that there seemed to be no "accurate statement" of how courts—and, for that matter, lawyers—interpret, we have become awash in a wide variety of interpretive theories.

---

[510] *See supra* note 495 and accompanying text. I submit that many legal texts do not speak with unquestionable clarity every time they are applied to a given factual context. Interpreters must take the blueprint of the statute and work it into something with greater definition (determinacy, if you will). This thought is analogous to Dworkin's idea about interpretation supplementing rather than supplanting rules. The role of the interpreter is to make language more definite, more precise—that is, to give it determinacy which most members of the interpretive community would agree is reasonable, given the language of the rule and the factual context in which it is applied. This does not mean that all members of the interpretive community agree that there is only *one* interpretation that will meet this goal, nor that they all have to agree on the same interpretation for it to be a reasonable one. The view I hold and advocate is that the role of the interpreter supplements the work of the author; it cannot supplant it. The interpreter's role has particular significance when we examine the relationship between Congress and the federal judiciary. While the interpreter's role is auxiliary to the duty of the legislature, it often gives the determinacy needed by individuals when they apply legal texts to a particular context.

While each theory may have something to offer to the interpreter who tackles a public legal text, most tend to exclude important, even vital, aspects of the interpretive enterprise so that something essential to the discernment of the text's meaning is lost. Consequently, they are generally limited in the degree of meaning that each can provide with regard to a specific legal text. But my general intent in writing has been to demonstrate both the contributions and the limitations of these theories. The basic purpose of this essay is not to criticize but to construct—to provide a framework offering the interpreter an attractive and sound framework to understand and explain the most difficult of legal texts whose meanings are disputed by rational, sensible people.

I believe that method in interpretation offers a process for developing better, sounder meanings of public law texts such as statutes and constitutions when their meanings are disputed by rational lawyers, judges, legislators, administrators, and citizens. The search for meaning is an important, even vital, enterprise in our existence as social beings because it is through the Rule of Law and our quest for the best understanding of what the law within the American legal system means, that we avoid surprise about expectations concerning obligations and entitlements. It is through the Rule of Law and the honest, humble search for the law's meaning that we come to understand more clearly the extent and limits of these obligations and entitlements. A major consequence of the Rule of Law and its coherent, rational, and moral interpretation is that citizens and their social, political, economic, cultural, and religious institutions obtain advance knowledge regarding where they stand in relation to one another. The law is justified by enabling us as citizens, colleagues, and friends to know in advance what our relationships with one another are in the context of the normative principles that define and determine obligations and entitlements. The law is the cement which holds many of our relationships together. But when those relationships deteriorate, it is the law which helps us reconcile where possible and resolve where necessary the breakdown of these relationships. Consequently, it is through interpretation of the law that we come to know what is it that the law gives or requires of us as citizens and companions in society.

In essence, method in interpretation is concerned with the meaning of words, intentions, goals, and contexts that are relevant to understanding what the text means and, equally important, what it does not. Method in interpretation is not a process simply to justify *a priori* general understandings or particular conclusions about the meaning of the text. Rather, it is a process—not always easy, sometimes difficult, but very much worth the effort—designed to search for the objective truth about the text's meaning as it applies to general as well as specific instances of human existence and encounter.

Method in interpretation brings together the contributions which theories of interpretation have made to understanding the meaning of legal texts. It synthesizes their strengths and eschews their weaknesses. Method in interpretation is not promoted solely on theory but rather on pragmatic labor as well. While it does not assert itself as the Rosetta stone of legal interpretation, it provides a sensible course to sift through much material to determine what the text means in the present case where reasonable, perhaps even astute and open-minded individuals, cannot agree. In doing this, method in interpretation offers guidance rather than answers for the future. As a process, it searches for the transcendent, objective, and remedial meaning of legal norms. In essence, method in interpretation equips those engaged in its process with the ability to encounter normative texts so that their application contributes to rather than impedes human flourishing.

Method in interpretation necessitates both humility and honesty on the part of those who engage in its process. The humility needed is of the sort that cultivates an awareness and an acceptance of the limitation of the text (it was not designed to address all issues of social, political, economic, and moral conflict for all times), and of the interpreter (our knowledge and understanding of the text will always be characterized with some incompleteness). The honesty required is essential to ensure that justification rather than rationalization is produced to support the understanding and explanation of the meaning of the law. With humility and honesty come strength, because the humility and honesty of which I speak provide the incentive or catalyst for disciplining the mind and the scope of the inquiry as well as for drawing on the patience needed to determine best in the present case what the text means. Humility and honesty also provide inducement to enter civil discourse with others which leads to greater harmony and less discord in the application of the meaning once it has been identified. It is humility, it is honesty, which concurrently remind the interpreter of the history of the text, the present moment in which it is being examined, and its future which has yet to unfold.

It is the humble as well as the noble of spirit and mind that will recognize both the familiar and the new in method in interpretation. To borrow from Lonergan's definition of "method," it becomes a part of the nature of the lawyer, the citizen, and the public official who acknowledge the merit of developing and practicing that "normative pattern" of recurring and related operations which generate "cumulative and progressive results."[511] This nature in turn becomes a habitual pattern, a type of virtuous conduct which leads the individual engaged in the process toward a better understanding of the law and its goals of service to the common good of the human family. Of course, with the development of method in interpretation, there comes communication. It is through these external relations that the discoveries and conclusions of the initial interpreter are passed on to others in the community. This communication not only passes on that which has been discovered; it also serves as a catalyst that reinvigorates the process by inviting new participants into the search for the transcendent and objective truth that is to be found in the normative text.

---

[511] *See supra* note 16.

THE SIGN OF "THE FOUR": JUDICIAL ASSIGNMENT AND THE RULE OF LAW

Jonathan L. Entin[*]

On July 30, 1963, Judge Benjamin Franklin Cameron threw the United States Court of Appeals for the Fifth Circuit into turmoil, charging Chief Judge Elbert P. Tuttle with manipulating the composition of panels in civil rights and desegregation cases so as to influence their outcome.[1] Specifically, he accused his colleague Tuttle of packing panels with liberal judges who consistently supported the claims of civil rights activists.[2] The liberal jurists, whom he derisively characterized as "The Four," were Tuttle, Richard T. Rives, John Minor Wisdom, and John R. Brown.[3] According to Judge Cameron, at least two of The Four sat in twenty-two of the twenty-five civil rights cases that the Fifth Circuit had heard during the preceding two years.[4] In the aggregate, The Four sat fifty-five times in these cases while the other five members of the court sat only twelve times. Moreover, one of The Four wrote the opinion in twenty-three of the twenty-five cases.[5]

---

[*] Professor of Law and Political Science, Case Western Reserve University.

[1] Armstrong v. Board of Educ., 323 F.2d 333, 358-59 (5th Cir. 1963).

[2] *Armstrong*, 323 F.2d at 353 n.1.

[3] *Id.*

[4] *Id.* at 358.

[5] *Id.* Cameron listed the cases and the panel membership in an appendix, and two weeks later added four more cases that he had previously overlooked. *Id.* at 359-61. The Four constituted at least a majority of the panel in three of those cases. *Id.* at 360-61.

Cameron further complained that he, a Mississippian, was excluded from three-judge district courts in Mississippi civil rights cases despite what he characterized as a previously "universal practice" in the Fifth Circuit and elsewhere of appointing the circuit judge resident in the state to three-judge courts. *Id.* at 358-

Cameron's sensational charges provoked a storm of controversy.[6] The suggestion of improper judicial assignment is always "troubling,"[7] but especially under these circumstances. Cameron had raised the specter of case rigging in the nation's most sensitive field and its most volatile region: race relations in the Deep South. Moreover, he had done so in the aftermath of the violence accompanying the desegregation of the University of Mississippi the previous year; contempt proceedings against the governor and lieutenant governor for their defiance in that matter were still pending in the Fifth Circuit.[8]

Although Cameron's figures appear at first glance to be persuasive, there are several possible responses to his charge of manipulation. One is that his data were inaccurate in certain respects.[9] Jack Bass, a journalist who chronicled the work of The Four, took this approach. Bass pointed out that Cameron omitted several cases from his analysis and skewed the numbers by separately counting every phase of some cases (particularly the University of Mississippi dispute) that came before the Fifth Circuit more than once, thereby exaggerating the number of decisions involving The Four.[10] Similarly, Bass found that the irate judge would have obtained less striking results if his study had covered a slightly longer time peri-

---

59. Instead, members of The Four were selected to hear these cases. *Id.*

[6] *See* JACK BASS, UNLIKELY HEROES 235–40 (1981); FRANK T. READ & LUCY S. MCGOUGH, LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH 268–72, 274–75 (1978); *see also* HARVEY C. COUCH, A HISTORY OF THE FIFTH CIRCUIT, 1891–1981, 120–21 (1984).

[7] Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987).

[8] *See generally* READ & MCGOUGH, *supra* note 6, at 254–65. There is a substantial literature on the desegregation of Ole Miss. For the perspective of the man who broke the color line, see JAMES MEREDITH, THREE YEARS IN MISSISSIPPI (1966). For chronicles by faculty members, see RUSSELL H. BARRETT, INTEGRATION AT OLE MISS (1965), and JAMES W. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 107-40 (1964). For more recent accounts, see NADINE COHADAS, THE BAND PLAYED DIXIE 57-106 (1997), and DAVID G. SANSING, MAKING HASTE SLOWLY 156-95 (1990).

[9] Cameron unquestionably was wrong in one respect: Judge Brown rather than Chief Judge Tuttle made the assignments. READ & MCGOUGH, *supra* note 6, at 272.

[10] BASS, *supra* note 6, at 241, 243-45.

od.[11] Moreover, Bass noted, several of Cameron's cases involved issues that had already been settled by the Supreme Court, so the composition of the panel should not have affected those results.[12] Finally, according to Bass, civil rights claimants actually lost several cases in which some combination of The Four constituted a majority of the panel.[13]

However, Bass's approach misses an important aspect of the criticism. The issue Cameron raised implicated not only the outcome of the cases, but the process by which the panels were selected.[14] From this perspective, his complaint was not only that panels were chosen with an eye toward influencing decisions, but also that assignments were not random.[15] An alternative explanation that responds to this concern focuses on the scheduling constraints arising from the preferences of individual judges.[16] There is some evidence for this explanation. For example, Cameron himself asked not to be assigned to any panels that included Chief Judge Tuttle due to their disagreement over civil rights; another judge did not want to sit with Cameron because of his insistence on late afternoon conferences after morning arguments; and a third judge had serious health problems that prevented him from sitting at all for most of the two years covered by Cameron's study.[17] Only three members of the Fifth Circuit—all of them part of The Four—were available to sit with every one of their colleagues.[18] Against this background, it seems reasonable that they would have participated in a disproportionate number of cases of all types.[19] There is some evidence for this hypothesis, although it is far from conclusive.[20]

---

[11] *Id.* at 244.

[12] *Id.*

[13] *Id.*

[14] *See* Burke Marshall, *Southern Judges in the Desegregation Struggle*, 95 HARV. L. REV. 1509, 1514 (1982) (book review).

[15] Armstrong v. Board of Educ., 323 F.2d 333, 358-59 (5th Cir. 1963). Cameron's objection to being excluded from three-judge district courts in Mississippi civil rights cases in the face of a tradition of appointing the resident circuit judge to three-judge courts in cases arising in his state suggests that he did not necessarily favor strictly random assignment in every case. *Armstrong*, 323 F.2d at 358-59.

[16] READ & MCGOUGH, *supra* note 6, at 273.

[17] *Id.* Moreover, two other members of the court who had interim appointments were not assigned to civil rights cases for several months in order to avoid antagonizing powerful segregationists in the Senate who could have blocked their confirmation. *Id.*; *see* BASS, *supra* note 6, at 240–41; COUCH, *supra* note 6, at 122. The propriety of insulating interim judges from hostile senators in this fashion is beyond the scope of this article. So is the constitutionality of interim judicial appointments, although the courts have upheld this practice. *See* United States v.

At this point, we can say that Cameron's data provide less support for his provocative charge of ideologically motivated assignments than he seemed to believe. There are benign explanations for at least some of his complaints, and his study is hardly a model of methodological rigor.

We shall return to Judge Cameron's charges later. Let us assume for now, though, that he was correct is asserting that judges in the Fifth Circuit's civil rights cases were not randomly assigned to panels. Exactly what is wrong with that? This is hardly a frivolous question. The relevant federal statutes do not require any particular method of judicial assignment to cases. In the courts of appeals, three-judge panels are composed and cases are assigned "as the court directs."[21] In

---

Woodley, 751 F.2d 1008 (9th Cir. 1985) (en banc); United States v. Allocco, 305 F.2d 704, 709-12 (2d Cir. 1962). Suffice it to say that these arrangements raise questions about the independence of persons exercising judicial power under Article III of the Constitution. *Cf. Woodley*, 751 F.2d at 1014-33 (Norris, J., dissenting); Note, *Recess Appointments to the Supreme Court—Constitutional But Unwise?*, 10 STAN. L. REV. 124 (1957); *Members of Faculty Question Wisdom of Earl Warren's Recess Appointment*, HARV. L. SCH. REC., Oct. 8, 1953, at 1; Henry M. Hart, Jr., Letter, HARV. L. SCH. REC., Oct. 8, 1953, at 2. But the two Fifth Circuit judges were not unique. Among others who first took the bench under interim appointments were Chief Justice Warren and Justices Brennan and Stewart. *See* HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS 257-58, 266, 272-73 (3d ed. 1992).

[18] BASS, *supra* note 6, at 241.

[19] *Id.*

[20] *Id.* From January to October 1961, a period that includes only part of Cameron's study, "some combination of The Four sat on 159 of the 191 nonrace cases heard by Fifth Circuit panels." *Id.*

[21] 28 U.S.C. § 46(b) (1994). This provision directs the Federal Circuit to adopt "a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard." *Id.* No such language appears in this statute with respect to any other court of appeals. Another difference between the Federal Circuit and the geographically based circuits is that the former may sit in panels having more than three members, whereas

district courts containing more than one judge, cases are to be "divided among the judges as provided by the rules and orders of the court."[22] And in the now infrequently constituted three-judge district courts, the chief judge of the circuit designates two of the members; except for the requirement that at least one of these must be a circuit judge, the statute does not otherwise specify how these judges are to be chosen.[23] Some courts have adopted rules or internal operating procedures governing judicial assignment, but many others (at both the federal and the state level) appear to have no written policy on the subject.[24]

Nevertheless, claims of assignment manipulation clearly strike a raw nerve. Judges are sensitive to the appearance of impropriety that might be inferred from unusual assignment procedures.[25] Moreover, the perception that judicial assignments matter is supported by the continuing contentiousness over judicial appointments.[26] There are also well-documented efforts to evade customary procedures for assigning cases to judges. People have gone to jail[27] and lawyers have been severely disciplined[28] for trying to circumvent the assignment system.

---

the latter may not. 28 U.S.C. § 46(c) (1994).

[22] 28 U.S.C. § 137 (1994).

[23] 28 U.S.C. § 2284(b)(1) (1994). The third judge must be the district judge to whom the case, with its request for the convening of a three-judge court, was initially assigned. *Id.*

[24] *See infra* notes 67-73 and accompanying text.

[25] BASS, *supra* note 6, at 237-40. Many Fifth Circuit judges were apoplectic over Cameron's allegations, and Chief Judge Tuttle convened an emergency meeting to try to clear the air. *Id.*; READ & MCGOUGH, *supra* note 6, at 269–71. *Cf.* Rappaport v. VV Publ'g Corp., 637 N.Y.S.2d 109 (App. Div. 1996) (upholding dismissal of judge's libel suit on grounds that statements in article that judge was receiving disproportionate share of certain cases were not defamatory as matter of law).

[26] Chief Justice Rehnquist expressed concern over delays in confirming federal judges, a phenomenon apparently due to political differences between the White House and the Senate. William H. Rehnquist, *The 1997 Year-End Report of the Federal Judiciary*, THE THIRD BRANCH, Jan. 1998, at 1, 3.

[27] *See, e.g.,* United States v. August, 745 F.2d 400 (6th Cir. 1984); State v. Jurek, 556 N.E.2d 1191 (Ohio Ct. App. 1989); State v. McCool, 544 N.E.2d 933 (Ohio Ct. App. 1988).

[28] *See, e.g.,* Grievance Adm'r v. August, 475 N.W.2d 256 (Mich. 1991) (suspen-

There is a surprisingly large body of case law on judicial assignment. Most of that case law has arisen in lower-profile disputes than civil rights and desegregation. The bulk of them involve judicial assignment at the trial court level, although the analysis in those cases presumably should apply to analogous situations at the appellate level. Some claims in this area invoke the Constitution, while others rely on various theories under state law or court rules and procedures. Whatever the basis for these claims, they rarely succeed even when the facts suggest that judges were assigned in non-random fashion.

This article will examine the issues of judicial assignment. Then the article will return to the Cameron situation in an effort to put that controversy into broader perspective. Finally, the article will consider state procedures that, for practical purposes, authorize litigants to make peremptory challenges to judges in certain circumstances. Those procedures have implications for the discussion of random assignments and for the way we think about Judge Cameron's charges.

I. THE CONSTITUTION AND JUDICIAL ASSIGNMENT

Manipulation of judicial assignments can deprive litigants of their right to a fair hearing and contravene basic principles of due process. As the Supreme Court has put it, due process "clearly requires a 'fair trial in a fair tribunal.'"[29] However, the federal courts, as well as most state courts, have generally been unreceptive to constitutional challenges to judicial assignment.

An often-cited case that rejects the argument that the Constitution requires random assignment is *United States v. Keane*.[30] *Keane* involved the prosecution of a powerful member of the Chicago city council for mail fraud and conspira-

---

sion); Cleveland Bar Ass'n v. Jurek, 581 N.E.2d 1356 (Ohio 1991) (disbarment); Office of Disciplinary Counsel v. Melamed, 580 N.E.2d 1077 (Ohio 1991) (disbarment); *In re* Bennett, 960 S.W.2d 35 (Tex. 1997) ($10,000 sanction).

[29] Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975)).

[30] 375 F. Supp. 1201, 1204 (N.D. Ill. 1974), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975).

cy.[31] By local rule, the district court ordinarily assigned cases randomly.[32] In "protracted, difficult or widely publicized" cases, however, the rule authorized the chief judge to bypass the random assignment process and, in consultation with the court's executive committee, to assign the matter to a particular judge.[33] The defendant claimed that this procedure violated his due process rights, but the executive committee disagreed.[34] The judges explained that due process does not give a party "the right to determine the manner in which his case is assigned to a judge."[35] Assignment rules promulgated by district courts pursuant to the governing federal statutes are designed "to promote efficiency . . . and the court has a large measure of discretion in applying them."[36]

The *Keane* court's characterization of the defendant's claim might not have been entirely accurate. He was not asserting a constitutional right to "determine the manner in which his case [should be] assigned"; rather, he argued that he had a constitutional right to random assignment.[37] Several circuit courts have explicitly rejected such an argument.[38] One of those rulings cites *Keane* for this proposition,[39] which seems to be a fair reading of the logic if not the language of that decision.

Not all courts have rejected due process claims out of hand, however. A prominent example is *Tyson v. Trigg*,[40] a case involving the former heavyweight boxing champion who served several years in prison following a rape conviction and has had other legal difficulties.[41] Mike Tyson argued that the method for assigning the trial judge in his Indiana rape trial effectively allowed the prosecutor to choose the judge, which violated his due process rights.[42] Under that system, a prosecutor who sought an indictment could choose the grand jury before which to present evidence.[43] Because each judge in the criminal division supervised only one grand jury and presided at all trials resulting from that grand jury's indictments, the prosecutor's selection of a specific grand jury effectively amounted to choosing the trial judge.[44] Chief Judge Posner of the United States Court of Appeals for the Seventh Circuit recognized that, despite the general assumption that judges are impartial, a litigant who can choose her judge "may be able to obtain a subtle advantage over the other."[45] Nevertheless, he rejected Tyson's claim, in part due to the procedural rigors of habeas corpus law[46] and in part for lack of evidence that the prosecutor actually selected a particular grand jury to get the trial assigned to a particular judge.[47]

---

[31] *Keane*, 375 F. Supp. at 1205.

[32] *Id.* at 1203.

[33] *Id.* at 1203–04.

[34] *Id.* at 1204-05.

[35] *Id.* at 1204.

[36] *Id.* at 1204–05. The court also rejected the defendant's claim that he was constitutionally entitled to a hearing on the chief judge's determination that his case promised to be "protracted, difficult and widely publicized." *Id.* at 1205.

[37] *Id.* at 1204-05.

[38] *See, e.g.*, Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984); United States v. Simmons, 476 F.2d 33, 35 (9th Cir. 1973). *Accord* People v. Hattery, 539 N.E.2d 368, 379–80 (Ill. App. Ct. 1989). One state court has characterized such a due process claim as "frivolous." Dancer v. State, 715 P.2d 1174, 1176-77 n.1 (Alaska Ct. App. 1986).

[39] *Sinito*, 750 F.2d at 515.

[40] 50 F.3d 436 (7th Cir. 1995).

Some state courts also have expressed a measure of sympathy for constitutional arguments in this context. For example, a Florida appellate court suggested that a policy that eliminated random assignment in about half of a trial court's criminal cases might be unconstitutional,[48] but ultimately invalidated that policy because it was adopted in violation of applicable state procedural requirements.[49] The Louisiana Supreme Court went even further in *State v. Simpson*,[50] holding that due process requires that felony cases be assigned randomly or under an alternative mechanism that prevents the prosecutor from controlling judicial assignments.[51] Although the *Simpson* court did not explain the details of the assignment system that it found unconstitutional, the trial court apparently gave the prosecutor's office the power to determine which judge would hear each criminal case, and that the prosecutor intentionally used that power to select its preferred judges in many instances. Meanwhile, the same trial court randomly assigned all civil cases.[52]

---

[41] *See* Brian Mooar & Fern Shen, *Two Motorists May File Charges Against Tyson After Md. Crash*, WASH. POST, Sept. 2, 1998, at A8 (summarizing Tyson's various legal problems).

[42] *Tyson*, 50 F.3d at 438.

[43] *Id.*

[44] *Id.* at 438-39.

[45] *Id.* at 439. Judge Posner also noted that, partly due to criticism of the procedure in the wake of Tyson's trial, the state adopted a new procedure that prevents a prosecutor from effectively dictating judicial assignments in criminal cases. *Id.*

[46] *Id.* at 439–40.

[47] *Id.* at 441–42.

[48] State *ex rel.* Zuberi v. Brinker, 323 So. 2d 623, 625 n.5 (Fla. Dist. Ct. App. 1975) (implying that assignment system that treats some criminal cases differently than others violates equal protection guarantees).

The evidence that the prosecutor deliberately sought to use the power to match cases with preferred judges makes *Simpson* a much stronger case for finding a due process violation than *Tyson*. Under the circumstances, it is not surprising that the *Simpson* court called for random assignment or something substantially equivalent. However, the difficulties of enforcing the right have undermined the vitality of any such constitutional rule. Courts have required a litigant to show prejudice from a non-random or otherwise improper judicial assignment.[53] Even in post-*Simpson* Louisiana, the courts have rejected numerous claims on harmless error grounds because the aggrieved party could not show how the defective assignment prejudiced the case.[54]

Judicial reluctance to endorse a constitutional right to random assignment might reflect the difficulty of implementing a sweeping general rule. First, cases are not equivalent.

---

[49] *Brinker*, 323 So. 2d at 625-26. The new policy was not submitted to the state supreme court for approval as required by applicable rules. *Id.*

[50] 551 So. 2d 1303 (La. 1984) (per curiam).

[51] *Simpson*, 551 So. 2d at 1304.

[52] State v. Romero, 552 So. 2d 45, 47-48 (La. Ct. App. 1989) (describing prosecutor's approach to judicial selection in same trial court as that in *Simpson*).

[53] *See, e.g.*, Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984); United States v. Simmons, 476 F.2d 33, 35 (9th Cir. 1973).

[54] *See, e.g.*, State v. Huls, 676 So. 2d 160, 167 (La. Ct. App. 1996); *Romero*, 552 So. 2d at 49.

Some are easy and some are hard. Some will go to trial, while most will not (and of those that do not go to trial, some will settle, whereas others will terminate by a ruling on a dispositive motion). Some will attract widespread public attention, but the vast majority will proceed in obscurity. Because "[a] case is not a standard measurement,"[55] it is inappropriate to require completely random assignment. Second, some cases are related—by issue or parties—to other cases. Assigning related cases to the same judge or panel often makes sense on efficiency grounds. Third, some difficult or sensitive cases might be better handled by more experienced judges. Fourth, judges sometimes recuse themselves from cases in which they have a conflict of interest or their impartiality might be called into question. Fifth, some cases appear in a court more than once. This phenomenon occurs, for instance, when a reviewing court remands a case with instructions for further proceedings. Often, although not necessarily in every case, returning the matter to the same judge or panel that heard it before conserves judicial resources.

These are not insurmountable difficulties, but they might be viewed mainly as administrative challenges that do not implicate due process concerns.[56] At least the judiciary seems to think so. Therefore, reliance upon constitutional arguments as a basis for random assignment seems an unpromising strategy. Courts are generally skeptical of such arguments. Even those courts that have been rhetorically sensitive to such claims have required proponents to meet high evidentiary standards.[57] Instead, the law relating to judicial assignments has arisen primarily from "the professional standards of the bench and bar,"[58] particularly from court policies and rules.

---

[55] RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 64 (1996).

[56] A useful illustration comes from the Fifth Circuit. Faced with widespread recusals that made it difficult to assign energy regulation cases to regular panels, for more than two decades the court has had a special panel that hears such cases. A new panel is drawn each year from the pool of judges who are not disqualified. Its members are selected randomly from the pool. *See generally* DAVID E. PIERCE & JONATHAN L. ENTIN, EVALUATING THE INSTITUTIONAL IMPACT OF THE SPECIAL OIL AND GAS PANEL OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT (Federal Judicial Center working paper, 1993).

[57] *See Sinito*, 750 F.2d at 515; *Huls*, 676 So. 2d at 167.

II. OTHER APPROACHES TO JUDICIAL ASSIGNMENT

A. Assignment Rules and Policies

In addition to the flexibility of judicial assignment apparently afforded by the Constitution, federal law does not mandate any particular approach to judicial assignment. As previously discussed, the statutes governing the courts of appeals and the district courts leave that process to those tribunals.[59] Neither the Federal Rules of Appellate Procedure nor the Federal Rules of Civil Procedure address this subject.

At the circuit level, only one court, the Ninth Circuit, has adopted rules generally calling for random assignment.[60] The Ninth Circuit also has promulgated rules calling for random assignment in certain complex cases.[61] A few other appellate courts have adopted policies that generally provide for random assignment.[62] Those circuits that have no explicit rule or policy appear to assign cases more or less randomly.[63] In allocating cases to panels, all circuits take account of the complexity of the case and other factors that make it unrealistic to treat every filed appeal as equally demanding of judicial time and energy.

Many multi-member district courts have adopted explicit rules or policies generally calling for random assignment of cases.[64] Those systems frequently contain express exceptions or authorize departures from strictly random assignment to promote efficiency.[65] A similar pattern appears at the state level. Court rules generally govern assignment and typically involve some form of random procedure, subject to efficiency or practicability exceptions.[66] Statutory provisions on this topic are unusual, but they also embody a preference for randomness.[67]

---

[58] Bracy v. Gramley, 117 S. Ct. 1793, 1797 (1997).

[59] *See supra* notes 21-24 and accompanying text.

[60] *See* 9TH CIR. R. Introduction § E(2).

[61] *Id.* R. 22-1(b), 22-3(b) (death penalty); R. 35-3 (limited en banc rehearings involving chief judge and ten other randomly selected judges).

[62] *See* 3D CIR. INT. OP. PROC. 1.1; 4TH CIR. INT. OP. PROC. 34.1; 6TH CIR. INT. OP. PROC. 19.1–19.2.

[63] *See, e.g.,* 7TH CIR. INT. OP. PROC. 6(b) (noting that in successive appeal, original panel may opt to decide subsequent appeal or "return the case for reassignment at random"). Some circuits also make a specific provision for random assignments in attorney discipline cases. *See, e.g.,* 4TH CIR. R. 46(g)(8); 10TH CIR. R. ADD. III, § 4.3.

[64] *See, e.g.,* M.D. ALA. R. 40.1; D. ARIZ. R. 1.2(c); S.D. CAL. R. 40.1(a); S.D.

B. Enforcing Assignment Rules and Policies

Challenges to arbitrary judicial assignments must surmount both procedural and substantive hurdles. On the procedural side, there are questions of timing and reviewability. On the substantive side, the challenger usually must show that some prejudice resulted from the irregular assignment.

1. Procedural Issues

A party who believes that a court has improperly assigned a judge to the case can challenge the assignment at the outset of the proceedings.[68] If this fails, it is not clear whether an interlocutory appeal or an action in mandamus or prohibition will lie. Although one court has granted a writ of mandamus compelling reassignment before trial,[69] others have refused relief because the challenged action is either discretionary or reviewable on direct appeal from a final judgment on the mer-

---

FLA. R. 3.4(A); S.D.N.Y. R. 1; E.D. WIS. R. 4.01–4.02.

[65] *See, e.g.,* D. COLO. R. 40.1(A); D.D.C. R. 403; N.D. ILL. R. 2.00; N.D. OHIO R. 57.9.

[66] *See, e.g.,* CAL. CT. APP. 1ST DIST. INT. OP. PROC. 21(a), 26; ILL. APP. CT. 1ST DIST. R. 2(c); MICH. CT. R. 8.111(B); N.Y. CT. R. 200.11(b), (c), 202.3(b), (c); OHIO SUP. CT. R. 36(B)(1)(c). One state court declares that it does not make assignments "on a random or arbitrary basis," but does not explain how it does handle this task. OR. CT. APP. INT. PRAC. Introduction n.*.

[67] *See, e.g.,* LA. CODE CIV. PROC. ANN. art. 253.1 (West Supp. 1998); UTAH CODE ANN. § 78-2a-2(2) (1986).

[68] *See, e.g.,* Utah-Idaho Sugar Co. v. Ritter, 461 F.2d 1100 (10th Cir. 1972); United States v. Keane, 375 F. Supp. 1201 (N.D. Ill. 1974), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975); People v. Bell, 659 N.Y.S.2d 713 (Sup. Ct. 1997).

[69] Margold v. Eighth Jud. Dist. Ct., 858 P.2d 33 (Nev. 1993).

its.[70]

2. Substantive Issues

On at least two occasions, federal courts of appeals have overturned judicial assignments in situations of apparent overreaching by chief judges in multi-member federal district courts. The relevant statute leaves judicial assignments in such courts to local rules, with the chief judge retaining responsibility for their proper implementation.[71] In *Utah-Idaho Sugar Co. v. Ritter*,[72] the Tenth Circuit issued a writ of mandamus to overturn a chief judge's reassignment of a case that should have gone to one of his colleagues.[73] More recently, in *In re McBryde*,[74] the Fifth Circuit set aside another chief judge's assertion of authority over cases that had been on one of his colleagues' docket.[75] Both cases arose in highly unusual circumstances.

Ritter was part of a long-running judicial feud in the United States District Court for the District of Utah. Because the two judges of that court were unable to agree on the allocation of business, the Tenth Circuit judicial council imposed its own assignment system (essentially a random scheme in most respects).[76] When the second judge took senior status almost fifteen years later, the chief judge reassigned some cases on that judge's docket to himself rather than leaving them for the replacement judge, who was sworn in on the day his predecessor went senior.[77] The Tenth Circuit held the chief judge's actions void because the relevant statute precluded unilateral assignments by the chief judge, and because the circuit judicial council's assignment order remained in force despite changes in the composition of the district court.[78]

---

[70] Coastal Oil N.Y., Inc. v. Newton, 660 N.Y.S.2d 428 (App. Div. 1997); State *ex rel.* Berger v. McMonagle, 451 N.E.2d 225 (Ohio 1983).

[71] The statute provides for division of business among district judges:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.
>
> The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe.

28 U.S.C. § 137 (1994).

[72] 461 F.2d 1100 (10th Cir. 1972).

[73] *Ritter*, 461 F.2d at 1104.

[74] 117 F.3d 208 (5th Cir. 1997).

[75] *McBryde*, 117 F.3d at 230.

[76] *Ritter*, 461 F.2d at 1102.

McBryde arose in somewhat less contentious circumstances, but there is reason to suspect the existence of a difficult personal relationship between the judges involved. The chief judge reassigned himself two cases that had been on the other judge's docket after controversy arose about the first judge's handling of those cases.[79] In one case, the judge had held an assistant United States attorney in contempt for her conduct in a criminal case.[80] In the other case, the judge harshly criticized the clerk of the court for failing to invest the settlement proceeds in a wrongful death action in an interest-bearing account, a failure that apparently cost the decedent's minor daughter a substantial amount of money.[81] According to the court of appeals, the facts suggested that the chief judge took over the cases because he disagreed with the other judge's handling of those matters.[82] Although the chief judge has broad administrative authority to "reassign cases in situations involving the recusal, death, disability, or new appointment of a judge,"[83] the Fifth Circuit reasoned that allowing reassignment motivated only by disapproval of another judge's actions is "antithetical to and incompatible with the structure of the federal judicial system."[84]

---

[77] *Id.*

[78] *Id.* at 1103–04.

[79] *McBryde*, 117 F.3d at 208.

[80] *Id.* at 212-13.

[81] *Id.* at 214-15.

[82] *Id.* at 228-29.

[83] *Id.* at 225.

[84] *Id.* Before reaching its conclusion on the merits, the court of appeals had to grapple with some difficult jurisdictional questions. The major problem was that the Fifth Circuit's judicial council had previously approved the chief judge's actions. *Id.* at 217. The effect of that approval, the panel's appellate jurisdiction

It is understandable that reviewing courts would intervene to ameliorate the effects of interpersonal judicial conflicts. But courts otherwise have been decidedly reluctant to overturn assignments, even when they disapprove of the way a case was assigned.[85] Moreover, courts have tended to defer to decisions to bypass the customary assignment system for matters that might be related to other cases in the same court, for dispositions on remand, or for other successive proceedings in the same case.[86]

Judicial reluctance to intercede in assignments is reflected in the widespread requirement that a litigant establish prejudice from any improper judicial assignment. Mere departure from a random assignment procedure is insufficient to overturn a decision.[87] The standard explanation for the prejudice requirement is that assignment rules are essentially "internal housekeeping rules" designed to promote judicial efficiency, so courts have wide discretion in this field.[88]

For example, a court may adopt a random assignment plan that makes only some of its members eligible for selec-

---

over the council's order, and the council's authority to issue the order received extensive attention in the opinion. *Id.* at 219–21, 226–30. The difficulty of the question of jurisdiction over the judicial council's order may be indicated by the fact that the other two members of the panel declined to join that part of the opinion, which those judges viewed as unnecessary to resolution of the case. *Id.* at 231 (Garza, J., specially concurring); *id.* (Dennis, J., specially concurring).

In the most recent chapter of this controversy, the Fifth Circuit has ordered Judge McBryde to recuse himself from two unrelated criminal cases because defense counsel in those cases had testified against him in the judicial council proceedings. *See* United States v. Anderson, No. 97-11205, 1998 WL 781240 (5th Cir. 1998); United States v. Avilez-Reyes, No. 97-11392, 1998 WL 781243 (5th Cir. 1998).

[85] *See, e.g.,* United States v. Osum, 943 F.2d 1394 (5th Cir. 1991); United States v. Flynt, 756 F.2d 1352, 1355 n.2 (9th Cir. 1985); Okereke v. Kane, 470 N.Y.S.2d 222, 223 (App. Div. 1983).

[86] *See, e.g., Osum,* 943 F.2d at 1398.

[87] *See, e.g., id.* at 1399–400; United States v. Gray, 876 F.2d 1411, 1415 (9th Cir. 1989); United States v. Allen, 675 F.2d 1373, 1385 (9th Cir. 1980); *In re* Marriage of Kenik, 536 N.E.2d 982, 985 (Ill. App. Ct. 1989).

[88] Sinito v. United States, 750 F.2d 512, 515 (6th Cir. 1984). *See, e.g., Osum,* 943 F.2d 1394, 1400-01 n.3 (5th Cir. 1991); United States v. Torbert, 496 F.2d 154, 157 (9th Cir. 1974); Kruckenberg v. Powell, 422 So. 2d 994, 996 (Fla. Dist. Ct. App. 1982); Blair v. Mackoff, 672 N.E.2d 895, 899 (Ill. App. Ct. 1996).

tion in certain classes of cases.[89] Also, courts may assign cases involving the same or similar issues outside the customary assignment process,[90] although such assignment is not required.[91] One problem with this is that reasonable persons can disagree as to what constitutes a "related" case.[92] Similarly, a court does not have to reassign a case following a mistrial[93] or on remand from a higher court.[94] After some remands, however, reassignment is ordered.[95] Whether reassignment on remand is required depends on the extent to which the original judge could be expected "to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous;" the need "to preserve the appearance of justice;" and a balancing of the "waste and duplication" caused by reassignment against the benefits gained.[96]

---

[89] Several courts have approved the practice of limiting the pool of eligible judges in death penalty cases. *See, e.g.,* People v. Hattery, 539 N.E.2d 368, 380-81 (Ill. App. Ct. 1989); People v. Hale, 661 N.Y.S.2d 457, 469–70 (Sup. Ct. 1997); People v. Bell, 659 N.Y.S.2d 713, 715 (Sup. Ct. 1997). *Cf.* United States v. Keane, 375 F. Supp. 1201, 1205-06 (N.D. Ill. 1974) (upholding plan limiting pool of judges eligible to hear "protracted, difficult or widely publicized" cases), *aff'd in part and rev'd in part on other grounds*, 522 F.2d 534 (7th Cir. 1975); *see supra* notes 23-27 and accompanying text.

[90] *See, e.g.,* Civil Aeronautics Bd. v. Carefree Travel, Inc., 513 F.2d 375, 383–84 (2d Cir. 1975); Wayne County Prosecutor v. Parole Bd., 532 N.W.2d 899, 902-03 (Mich. Ct. App. 1995) (per curiam). *Cf.* Stinchcomb v. State, 383 S.E.2d 609 (Ga. Ct. App. 1989) (finding no reversible error in non-random assignment based on mistaken belief that case was related to another case assigned to same judge).

[91] *See, e.g.,* Tokars v. Superior Ct., 442 S.E.2d 454 (Ga. 1994) (upholding random assignment in death penalty case despite local rule favoring assignment of co-defendants to same judge).

[92] *See, e.g.,* Morfesis v. Wilk, 525 N.Y.S.2d 599 (App. Div. 1988) (concluding unanimously that related cases may be assigned non-randomly, but dividing 3–2 on whether particular cases were in fact related).

[93] *See* United States v. Beech-Nut Nutrition Corp., 925 F.2d 604, 608–09 (2d Cir. 1991).

[94] *See, e.g.,* Brown v. Baden, 815 F.2d 575, 576 (9th Cir. 1987) (per curiam).

[95] *See, e.g.,* United States v. Sears, Roebuck & Co., 785 F.2d 777, 781 (9th Cir. 1986) (per curiam); United States v. Alverson, 666 F.2d 341, 349–50 (9th Cir. 1982). *Cf.* Ash v. Georgia-Pacific Corp., 957 F.2d 432, 435 (7th Cir. 1992) (allowing parties to agree to have case heard on remand by original trial judge despite court of appeals' order that case be randomly assigned for further proceedings).

[96] United States v. Robin, 553 F.2d 8, 10 (2d Cir. 1977) (per curiam). *See also*

In sum, there seems to be no hard and fast rule requiring random assignment of judges to cases. Courts apparently enjoy broad latitude in administering their dockets. Although challenges to the implementation of assignment plans are not as difficult to sustain as are constitutional claims, they present formidable hurdles for most litigants. However, none of the cases mentioned above involved allegations of bias or partiality against judges. That was what Judge Cameron asserted in his attack on The Four.

III. JUDGE CAMERON REDUX

If Judge Cameron was correct that the panels in civil rights and desegregation cases were manipulated to influence substantive decisions, his charges raised profound issues of both constitutionality and propriety.[97] As explained above, there is reason to doubt that assignments were actually made for that dubious purpose.[98]

But we should not lose signt of a fundamentally important fact: some judges—and Cameron was among the most notorious in this respect—simply refuse to accept the legitimacy of *Brown v. Board of Education*[99] and other Supreme Court rulings against racial discrimination.[100] In particular,

---

Alverson, 666 F.2d at 349; United States v. Ferguson, 624 F.2d 81, 83–84 (9th Cir. 1980).

[97] Tyson v. Trigg, 50 F.3d 436, 438 (7th Cir. 1995); *see* Marshall, *supra* note 14, at 1514.

[98] *See supra* notes 15-20 and accompanying text.

[99] 347 U.S. 483 (1954).

[100] Cameron consistently voted against African-American litigants during his tenure on the Fifth Circuit. *See* Bailey v. Patterson, 323 F.2d 201, 208 (5th Cir. 1963) (Cameron, J., dissenting); Davis v. Board of Sch. Comm'rs, 322 F.2d 356, 362 (5th Cir. 1963) (Cameron, J., dissenting); Alabama v. United States, 304 F.2d 583, 594 (5th Cir. 1963) (Cameron, J., dissenting), *aff'd*, 371 U.S. 37 (1962); United States v. Wood, 295 F.2d 772, 785 (5th Cir. 1961) (Cameron, J., dissenting); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (Cameron, J., dissenting); Boman v. Birmingham Transit Co., 292 F.2d 4, 4 (5th Cir. 1961) (Cameron, J., dissenting); Boson v. Rippy, 275 F.2d 850, 853 (5th Cir. 1960) (Cameron, J., dissenting); Reddix v. Lucky, 252 F.2d 930, 938 (5th Cir. 1958) (Cameron, J., dissenting); Sharp v. Lucky, 252 F.2d 910, 913 (5th Cir. 1958) (Cameron, J., dissenting); Avery v. Wichita Falls Indep. Sch. Dist., 241 F.2d

Cameron's performance in connection with the desegregation of the University of Mississippi raises serious questions about his fitness to sit in other civil rights cases. In that controversy, a panel of the Fifth Circuit (two of whom were among The Four) directed the district judge to order the African-American plaintiff, James Meredith, admitted to the University.[101] The day after the mandate issued, Cameron, who was not a member of the panel, issued a stay (to permit the State to file a petition for certiorari in the Supreme Court, he said).[102] The panel vacated Cameron's stay, reasoning that it was too late to recall the mandate and that the Supreme Court could stay the injunction if that were appropriate.[103] The next day, Cameron entered another order reinstating his stay.[104] The panel vacated Cameron's second stay the same day it was issued.[105] Three days later, Cameron entered his third stay.[106] The panel once more vacated his action.[107] Undaunted, Cameron entered his fourth stay two days later.[108] After consulting with his colleagues, Justice Black finally ended this circus by declaring all of Cameron's orders void and refusing to issue a stay of the desegregation order.[109]

The Fifth Circuit, largely through the work of The Four, sought to overcome defiance, delay, and recalcitrance by way

---

230, 235 (5th Cir. 1957) (Cameron, J., dissenting). The only exception located is a grudging concurrence in United States v. Atkins, 323 F.2d 733, 745 (5th Cir. 1963) (Cameron, J., concurring specially in the result).

[101] Meredith v. Fair, 305 F.2d 343 (5th Cir. June 25, 1962).

[102] Meredith v. Fair, 7 Race Rel. L. Rep. 741 (5th Cir. July 18, 1962) (Cameron, J.).

[103] Meredith v. Fair, 306 F.2d 374 (5th Cir. July 27, 1962).

[104] Meredith v. Fair, 7 Race Rel. L. Rep. 742 (5th Cir. July 28, 1962) (Cameron, J.).

[105] Meredith v. Fair, No. 19475 (5th Cir. July 28, 1962) (unreported).

[106] Meredith v. Fair, 7 Race Rel. L. Rep. 743 (5th Cir. July 31, 1962) (Cameron, J.).

[107] Meredith v. Fair, 7 Race Rel. L. Rep. 743 (5th Cir. Aug. 4, 1962) (per curiam).

[108] Meredith v. Fair, 7 Race Rel. L. Rep. 744 (5th Cir. Aug. 6, 1962) (Cameron, J.).

[109] Meredith v. Fair, 83 S. Ct. 10 (Sept. 10, 1962).

of procedural and doctrinal innovations.[110] Commentators have lionized their efforts in this regard.[111] At the same time, those efforts have prompted some sympathetic lawyers and scholars to raise questions about the wisdom and desirability of some of their innovations.[112] Devising a method to exclude the Camerons of the world from hearing cases in which they plainly would not follow the law is easy to justify.[113] It is more difficult to swallow an effort to marginalize cautious or hesitant judges.[114] However, that does not seem to be what happened in the Fifth Circuit. The most that can be said about Cameron's charges is that they were not proven.[115]

---

[110] *See* READ & MCGOUGH, *supra* note 6, at 272–73.

[111] *See generally* BASS, *supra* note 6.

[112] *See, e.g.,* Marshall, *supra* note 14, at 1512, 1514.

[113] Cameron's indefensible conduct might explain why the Fifth Circuit never adopted a policy of hearing desegregation cases en banc, as the Fourth Circuit did. *See* Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1672 (1998). Cameron would have been eligible to sit in en banc proceedings. Although some members of the Fourth Circuit were exceedingly cautious in civil rights cases, none was as recalcitrant as he was. *See* Jonathan L. Entin, *The Confirmation Process and the Quality of Political Debate*, 11 YALE L. & POL'Y REV. 407, 412–14 (1993) (discussing civil rights record of Judge Clement Haynsworth, whose nomination to Supreme Court was defeated partly on this basis).

[114] There is one last question to consider, a question that goes beyond the intricacies of legal doctrine: how much difference did the judiciary make in desegregation? This is a large and difficult subject that has generated a substantial literature. The basic facts are now well known. During the first decade after *Brown*, when almost the only sustained federal implementation activities were those of the district courts and the courts of appeals, public school desegregation in the Deep South was negligible. *See, e.g.,* J.W. PELTASON, FIFTY-EIGHT LONELY MEN (1961). The situation changed dramatically when the executive and legislative branches took a larger role. The passage of Title VI of the Civil Rights Act of 1964, which prohibited federal funding of racially discriminatory programs, and the Elementary and Secondary Education Act of 1965, which made available unprecedented amounts of federal school assistance, promoted substantial desegregation within a few years. *See* GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION (1969); GERALD N. ROSENBERG, THE HOLLOW HOPE 47–54 (1991). Similarly, the adoption of the Voting Rights Act of 1965 provided powerful leverage against discriminatory practices that had effectively excluded African Americans from the political process and led to the registration of millions of new voters. *See, e.g.,* STEVEN F. LAWSON, BLACK BALLOTS 329-52 (1976); ROSENBERG, *supra*, at 59–63.

[115] This is not to say that Cameron's charges have been forgotten. One judge

IV. JUDICIAL PEREMPTORIES AND RANDOM ASSIGNMENT

Cameron raised disturbing questions in a highly sensitive context. Those questions implicate important general features of our judicial system. At this more general level, the difficulty of successfully challenging non-random judicial assignments reflects the difficulty of proving anything more than a symbolic or procedural injury. We should not exaggerate the importance of a judge's identity or personal characteristics,[116] but a party who has a favorable judge "may be able to obtain a subtle advantage over the . . . [adversary because the judge could be] more likely to resolve close questions in that party's favor."[117]

Some states have embodied that intuition in statutes and policies that effectively allow litigants to exercise a limited form of peremptory challenge against a judge assigned to their case. These measures go beyond for-cause disqualification statutes that require a showing of bias or an appearance of impropriety.[118] Rather, they demand, at most, the timely filing of a good-faith request for substitution of a judge while strictly limiting the number of such requests.[119]

Moreover, although federal law currently does not provide

---

who joined the Fifth Circuit long after that episode referred to it in an interview about the court's special panel for energy regulation cases. *See generally* PIERCE & ENTIN, *supra* note 56.

[116] *See* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998).

[117] Tyson v. Trigg, 50 F.3d 436, 439 (7th Cir. 1995).

[118] *See, e.g.*, 28 U.S.C. §§ 144, 455 (1994).

[119] *See, e.g.*, ALASKA STAT. § 22.20.022 (Michie 1996); 735 ILL. COMP. STAT. ANN. § 5/2-1001 (West 1992); ILL. COMP. STAT. ANN. 5/114-5 (West 1992); IND. CODE ANN. § 35-36-5-1 (West 1998); MONT. CODE ANN. § 3-1-804 (1997); N.M. STAT. ANN. § 38-3-9 (Michie Supp. 1997); N.D. CENT. CODE § 29-15-21 (Michie Supp. 1997); WIS. STAT. ANN. § 801.58 (West 1994); WIS. STAT. ANN. § 971.20 (West Supp. 1997). For a comprehensive discussion of these and other statutes, and of judicial rulings and commentary, see State v. Holmes, 315 N.W.2d 703, 705-26 (Wis. 1982); *see also* Hornaday v. Rowland, 674 P.2d 1333, 1341–44 (Alaska 1983); People *ex rel.* Baricevic v. Wharton, 556 N.E.2d 253, 255-61 (Ill. 1990); People v. Walker, 519 N.E.2d 890, 891-97 (Ill. 1988); Traynor v. Leclerc, 561 N.W.2d 644, 647-50 (N.D. 1997); State *ex rel.* Ray Wells, Inc. v. Hargreaves, 761 P.2d 1306, 1306-10 (Or. 1988).

for peremptory challenges of judges, such a procedure has its advocates. For example, the original version of the proposed Judicial Reform Act of 1997 contained language authorizing parties to federal civil actions to obtain one substitution of judge as a matter of right.[120]

Although these devices for peremptory challenges against judges are not available in most states or in federal court, and are strictly limited in those jurisdictions that permit them, their very existence implies an ambivalence about random assignment of judges. This ambivalence resembles our difficulty in thinking clearly about race- and gender-based peremptory challenges of prospective jurors: at one level we want to believe that race and gender are irrelevant to juror decisionmaking, but at another level we recognize that these factors can make a difference.[121] As long as we remain ambivalent about how much a particular judge matters, our legal system will not require a strictly random assignment of judges. At the same time, it will properly condemn deliberate efforts to influence case outcomes, however subtly, by manipulating judicial assignments.

---

[120] H.R. 1252, 105th Cong., § 4 (1997).

[121] For a sophisticated analysis of these issues, see Eric L. Muller, *Solving the* Batson *Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93 (1996).

RECENT DECISION

CONSTITUTIONAL LAW—FIRST AMENDMENT—PUBLIC BROADCASTERS MAY EXCLUDE POLITICAL CANDIDATES FROM DEBATES AS LONG AS EXCLUSION IS REASONABLE AND VIEWPOINT-NEUTRAL

In June 1992, the Arkansas Educational Television Commission (AETC), a state agency, invited the two major party candidates for Arkansas' Third Congressional District seat to an October debate.[1] In August 1992, Ralph Forbes qualified under state law to appear on the ballot as an independent candidate and asked to be included in the debate.[2] Since AETC did not regard Forbes as a serious candidate, they denied his request.[3] Forbes filed suit in the United States District Court for the Western District of Arkansas, claiming a right to participate in the debate on both statutory and First Amendment grounds.[4]

---

[1] Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1637-38 (1998).

[2] *Forbes*, 118 S. Ct. at 1638. Forbes qualified as a candidate by obtaining two thousand signatures on a petition. *Id.*

[3] *Id.* at 1643. AETC contended that Forbes had little financial support or campaign organization and that neither voters nor news organizations considered him a viable candidate. *Id.* at 1643-44. AETC's executive director testified that the commissioners believed they served the public interest by excluding Forbes and limiting the debate to the major party candidates. *Id.* at 1638.

The United States Court of Appeals for the Eighth Circuit narrowed the issue to whether AETC had violated the First Amendment by excluding Forbes from the debate.[5] On remand, the district court entered judgment for AETC.[6] The court of appeals then reversed and remanded.[7] Citing conflict among circuits, the United States Supreme Court granted certiorari and held: reversed.[8] The Court held that a state-owned television station may exclude political candidates from a televised debate as long as the exclusion is reasonable and not based upon the speaker's viewpoint.[9]

---

[4] *Id.* Forbes sought injunctive and declaratory relief as well as damages. *Id.*

[5] *Id.* Both the district court and the court of appeals denied Forbes' request for injunctive relief. *Id.* The district court then dismissed Forbes' cause of action for failure to state a claim, and Forbes appealed. *Id.* The court of appeals, sitting *en banc*, affirmed the lower court's dismissal of the statutory claims but reversed the dismissal of the First Amendment claim. *Id.* On the statutory claims, all eleven judges agreed that Forbes had failed to exhaust his administrative remedies with the FCC. Forbes v. Arkansas Educ. Television Communication Network Foundation, 22 F.3d 1423, 1427, 1430 (8th Cir. 1994). On the First Amendment claims, a bare majority held that AETC was a state actor and subject to First Amendment scrutiny. *Forbes*, 22 F.3d at 1428-29. The majority remanded the case to determine whether AETC had a satisfactory reason for excluding Forbes. *Id.* at 1430. The five dissenting judges would have rendered judgment for AETC. *Id.* (McMillan, J., concurring in part and dissenting in part). The dissent argued that public forum analysis applied, the debate was a nonpublic forum, and AETC's reasons for excluding Forbes were presumably reasonable and viewpoint neutral. *Id.* at 1431. (McMillan, J., concurring in part and dissenting in part).

[6] *Forbes*, 118 S. Ct. at 1638. The district court ruled that the debate was a nonpublic forum, and the jury found that AETC's exclusion of Forbes was reasonable and not based upon Forbes' political beliefs. *Id.* Forbes appealed and argued that the debate was in fact a designated public forum, that AETC's decision to exclude him must pass strict scrutiny, and that AETC based its decision on criteria too broad and subjective to be constitutionally permissible. Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 499-500 (8th Cir. 1996).

[7] *Forbes*, 118 S. Ct. at 1638. The court of appeals adopted Forbes' position and remarked that the "real issue" was the constitutional sufficiency of AETC's criteria for excluding Forbes. *Forbes*, 93 F.3d at 504. The court of appeals remanded the case and instructed the district court to enter judgment for Forbes and empanel a jury to assess actual damages. *Id.* at 505.

[8] *Forbes*, 118 S. Ct. at 1638. The Supreme Court noted that the Eighth Circuit's decision conflicted with the Eleventh Circuit's holding in a similar case. *Id.* (citing Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 489-90 (11th Cir. 1990)).

I. LAW

A. *Access to Broadcasting Facilities*

The Supreme Court addressed the issue of access to broadcasting facilities in *Columbia Broadcasting System, Inc. v. Democratic National Committee*.[10] In *Democratic National Committee*, political organizations claimed that a broadcaster's refusal to air their paid advertisements violated the First Amendment.[11] The Court rejected their claim and held that a member of the public has no First Amendment right of access to private broadcasting facilities.[12] The Court explained that broadcasting cases involve several First Amendment interests, but the right of the public to be "fully and fairly informed" is paramount.[13] The Court recognized that Congress enacted a regulatory scheme that balanced these interests by allowing editorial discretion while also imposing public obligations of fairness and thoroughness.[14] The Court declined to disturb this legislative balancing of First Amendment interests.[15]

---

[9] *Id.* at 1643.

[10] 412 U.S. 94 (1973).

[11] *Democratic Nat'l Comm.*, 412 U.S. at 97. The political committee also based its claims on statutory grounds. *Id.* at 97, 110 n.8. *See generally* Thomas F. Ackley, Casenote, *Political Candidates' First Amendment Rights Can Be Trumped by Journalists' Editorial Rights: Candidates Barred from Public Television Debate in* Marcus v. Iowa Public Television, 31 CREIGHTON L. REV. 475, 484-94 (1998) (reviewing relevant federal communications law).

[12] *Democratic Nat'l Comm.*, 412 U.S. at 102. Lower courts applied the holding of *Democratic National Committee* to cases involving political candidates. *See* Johnson v. FCC, 829 F.2d 157, 161, 162-64 (D.C. Cir. 1987) (denying candidate's claim to participate in televised debate); Kennedy for Pres. Comm. v. FCC, 636 F.2d 417, 430-31 (D.C. Cir. 1980) (denying presidential candidate's claim to broadcast access). *But cf.* Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971) (explaining that First Amendment "has its fullest and most urgent application" to campaigns for political office).

[13] *Democratic Nat'l Comm.*, 412 U.S. at 127. The public's "right . . . to receive suitable access" to ideas outweighs the First Amendment rights of potential speakers and of broadcast licensees. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

[14] *Democratic Nat'l Comm.*, 412 U.S. at 109-10. *See also* CBS, Inc. v. FCC, 453 U.S. 367, 395 (1981) (balancing broadcasters' journalistic freedom with their public obligation to provide reasonable access for candidates). The Court recog-

---

nized that editorial discretion poses some risk of viewpoint discrimination. *Democratic Nat'l Comm.*, 412 U.S. at 124-25. But the Court concluded that Congress had provided statutory remedies for abuses and that courts could not feasibly supervise broadcast licensees. *Id.* at 110-11, 120.

[15] *Id.* at 102-03. A plurality of the Court, however, concluded that rejection of the First Amendment claim would be proper on the grounds that the actions of a private broadcast licensee do not constitute state action. *Id.* at 121. The Supreme Court has never definitively stated when "the action of a [private] broadcast licensee . . . is 'governmental action' for the purposes of the First Amendment." *Id.* at 114-15. *Cf.* Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (stating that broadcast licensee is not ordinarily considered state actor). Lower courts, though, have almost uniformly held that private broadcasters' programming decisions are not state action. *See, e.g.*, Belluso v. Turner Communications Corp., 633 F.2d 393, 398 (5th Cir. 1980) (emphasizing that licensee's actions are neither required nor approved by government body); *see also* Kevin W. Brown, Annotation, *Access of Public to Broadcast Facilities Under First Amendment*, 66 A.L.R. FED. 628, 632-35 (1984) (reviewing cases in which courts have held that private broadcasters are not state actors). Likewise, the programming decisions of noncommercial stations that are only partly funded by government sources do not constitute state action. *See* FCC v. League of Women Voters, 468 U.S. 364, 384-95 (1984) (distinguishing between state-owned facilities and noncommercial stations that receive government subsidies). However, lower courts failed to agree on how to resolve claims against state-owned stations. *See* Erick Howard, Comment, *Debating PBS: Broadcasting and the Power to Exclude Political Candidates from Televised Debates*, 1995 U. CHI. LEGAL F. 435, 436 (1995) (contrasting Eighth Circuit and Eleventh Circuit approaches). The Eighth Circuit has clearly distinguished between private and state-owned media, noting that a "journalist employed by the government is still a government employee." *Forbes*, 93 F.3d at 504; *see also* Marcus v. Iowa Pub. Television, 97 F.3d 1137, 1142 (8th Cir. 1996) (stating that public television commissioners are government actors even though they retain some editorial discretion). The Eleventh Circuit, however, concentrated on the similarities between public and private journalists and noted that public broadcasters are under the same statutory obligations to serve the public interest while exercising broad editorial discretion with regard to programming. *See* Chandler v. Georgia Pub. Telecomm. Comm'n, 917 F.2d 486, 488-89 (11th Cir. 1990) (holding that state may serve public interest by excluding candidates from debate); *see also* Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033, 1041 (Former 5th Cir. 1982) (holding that state-owned stations have same editorial discretion over programming as private stations). According to the Eleventh Circuit in *Chandler*, an excluded candidate's principal remedy against a broadcaster is statutory. *Chandler*, 917 F.2d at 489; *accord* DeYoung v. Patten, 898 F.2d 628, 632-33 (8th Cir. 1990) (*overruled* by *Forbes*, 22 F.3d at 1428-29) (holding that minor party candidate had no First Amendment right to appear on public television).

B. The Public Forum Doctrine

In *Perry Education Ass'n v. Perry Local Educators' Ass'n*,[16] the Supreme Court set forth the fundamentals of its public forum analysis.[17] In *Perry Education Ass'n*, a public school district granted one teachers' union exclusive access to the school's internal mail system.[18] The Court held that such preferential access to the mail system did not violate the First Amendment rights of other teachers' unions.[19] The Court explained that the right of access to government property is not absolute and that the government's ability to restrict expressive activity depends upon the nature of the forum.[20] The Court found that if government property has been opened, whether by tradition or designation, to public communication, then restrictions on that communication receive strict scrutiny.[21] If, on the other hand, property is not normally used for expressive activity, then the property is a nonpublic forum, and government restrictions need only be reasonable and viewpoint-neutral.[22] Applying these public forum rules, the Court found that the mail system was a nonpublic forum and that preferential access was reasonable under the circumstances.[23]

---

[16] 460 U.S. 37 (1983).

[17] *Perry Educ. Ass'n*, 460 U.S. at 45-46. *Perry Education Association* was the Supreme Court's "first major effort to recognize and classify the types of public forums." JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 1145 (5th ed. 1995). For a discussion of the history of the public forum doctrine, see Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1226-35 (1984); Peter Jakab, Note, *Public Forum Analysis After* Perry Education Association v. Perry Local Educators' Association: *A Conceptual Approach to Claims of First Amendment Access to Publicly Owned Property*, 54 FORDHAM L. REV. 545, 546-51 (1986).

[18] *Perry Educ. Ass'n*, 460 U.S. at 38-39, 41. The school granted preferential access to Perry Education Association because it was the exclusive bargaining representative for teachers. *Id.* at 51-52.

[19] *Id.* at 55. The Court insisted that the First Amendment does not require "equivalent access" to every part of a school in which expressive activity occurs. *Id.* at 44.

[20] *Id.* The First Amendment does not guarantee unfettered access to all property owned by the government. *See* United States Postal Serv. v. Council of Greenburgh Civic Ass'n, 453 U.S. 114, 128-29 (1981) (holding that statute prohibiting deposit of unstamped material in mailboxes does not violate First Amendment). Governments, like other property owners, dedicate and reserve property for certain uses, and expressive activity may be incompatible with its intended use. *See* Greer v. Spock, 424 U.S. 828, 836 (1976) (holding that military base is nonpublic forum); Lehman v. City of Shaker Heights, 418 U.S. 298, 403 (1974) (holding that city bus is nonpublic forum); Adderley v. Florida, 385 U.S. 39, 86 (1966) (holding that jail is nonpublic forum).

[21] *Perry Educ. Ass'n*, 460 U.S. at 45. The Court explained that in traditional

The Court clarified certain aspects of the public forum doctrine in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*[24] In *Cornelius*, a legal defense and advocacy organization claimed that the government had violated its First Amendment rights by excluding it from a charitable campaign held at federal offices.[25] To apply the proper level of scrutiny, the Court first had to determine the nature of the forum.[26] To

---

public fora, such as streets, parks, and sidewalks, government restrictions on speech are subject to strict scrutiny. *Id.* Content-based restrictions in traditional public fora must be narrowly tailored to serve a compelling state interest. *Id.* Restrictions on the time, place, and manner of expression must be content-neutral, narrowly tailored to serve a significant government interest, and also "leave open ample alternative channels of communication." *Id.* at 45. The Court distinguished between property traditionally used for public discourse and property designated as a place for expressive activity. *Id.* With such designated or limited public fora, the state is not required to keep the property open for expressive activity indefinitely, but as long as it remains open, the same level of scrutiny applies as in a traditional public forum. *Id.* at 46.

[22] *Id.* With a generally low level of scrutiny in nonpublic fora cases, the viewpoint-neutrality requirement "takes on heightened significance." David L. Kanel, Note, *The Role of Viewpoint Neutrality in Nonpublic Fora Access Restrictions:* Cornelius v. NAACP Legal Defense & Educational Fund, 20 U.S.F. L. REV. 851, 860 (1986).

[23] *Perry Educ. Ass'n*, 460 U.S. at 55. The Court ruled that the mail system was a nonpublic forum because the school had never opened it to general expressive activity. *Id.* at 47. The Court concluded that since the union had official duties as the teachers' exclusive bargaining representative, granting preferential access was reasonable under the circumstances. *Id.* at 51-53.

[24] 473 U.S. 788 (1983).

[25] *Cornelius*, 473 U.S. at 790-91. The legal defense fund argued that the charitable campaign was a limited public forum and the government's actions were subject to strict scrutiny. *Id.* at 797.

[26] *Id.* at 800. The Court explained that constitutionally protected speech, even political speech, "is not equally permissible in all places and at all times." *Id.* at 799. Courts have used public forum analysis to balance the speaker's interest in expressive activity with the government's "interest in limiting the use of its property to its intended purpose. . . ." *Id.* at 800. Courts have applied strict scrutiny

determine whether the campaign was a limited public forum or a nonpublic forum, the Court asked whether the government intended to provide general or selective access to the forum.[27] On the facts of *Cornelius*, the Court held that the government intended to provide only selective access and thus created only a nonpublic forum.[28]

---

or a reasonableness test depending upon whether the forum is a public forum or a nonpublic forum. *Id.* In *Cornelius*, the Court faced a more basic problem of defining the forum. *Id.* at 801. The Court reasoned that since the organization had sought access "to a particular means of communication" rather than a physical site, the relevant forum was the charity drive rather than the federal workplace in general. *Id.* at 801-02.

[27] *Id.* at 802-03. The government intent test in *Cornelius* was an important innovation in public forum doctrine. *See* David S. Day, *The End of the Public Forum Doctrine*, 78 IOWA L. REV. 143, 167 (1992) (arguing against such judicial deference to government officials). One problem, though, is that the government intent test makes it difficult to argue that property is a limited public forum, because the mere fact that the government barred a speaker from the forum is evidence of an intent to limit access. *See* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1536 (1998) (arguing that government intent test is both circular and speech-restrictive). The Supreme Court, however, has applied the intent test in subsequent decisions. *See* International Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992) (holding that government had not intended to designate airport terminal as public forum); United States v. Kokinda, 497 U.S. 720, 730 (1990) (holding that postal service had not expressly dedicated its sidewalks for expressive activity). In addition to developing the government intent test, the *Cornelius* Court attached great importance to the distinction between general and selective access. *Cornelius*, 473 U.S. at 803; *see also* Widmar v. Vincent, 454 U.S. 263, 267-68 (1981) (holding that state university which made facilities generally open to student groups could not restrict use by religious organizations). In *Widmar*, the Court argued that the university's general access policy "evidenced a clear intent to create a public forum." *Cornelius*, 473 U.S. at 802. In the *Cornelius* case, the Court found that the government had followed a longstanding policy of making individual determinations as to whether an organization could participate. *Id.* at 804.

[28] *Id.* at 804. The Court also held that the government's decision to exclude all advocacy groups was facially reasonable since the government had legitimate interests in avoiding the appearance of favoritism and preventing disruptions in the workplace. *Id.* at 809-10. But the Court remanded the case to determine whether the exclusion was motivated by a desire to suppress a point of view. *Id.* at 806, 812-13. The requirement of viewpoint neutrality is central to public forum analysis and can be traced to *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (striking down compulsory salute to American flag because government officials can not "prescribe what shall be orthodox" in matters of opinion). *See* Marjorie Heins, *Viewpoint Discrimination*, 24 HASTINGS CONST. L.Q. 99, 105-09 (1996) (summarizing history and application of viewpoint neutrali-

C. Objective Criteria

In *Shuttlesworth v. City of Birmingham*,[29] the Court addressed the issue of whether an ordinance requiring marchers to obtain permission from the city was too broad to be consistent with the First Amendment.[30] The organizers of a march argued that the ordinance, as written, gave city officials unlimited discretion to grant or deny permits.[31] The Court agreed with the organizers and invalidated the ordinance.[32] The Court held that licensing schemes and other prior restraints on speech are permissible only when there are "narrow, objective, and definite standards to guide the licensing authority."[33]

---

ty doctrine); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 640-41 (1994) (arguing that viewpoint-based restrictions undermine every person's "essential right" to consider all ideas).

[29] 394 U.S. 147 (1969).

[30] *Shuttlesworth*, 394 U.S. at 148. Courts have also addressed the problem of overbroad licensing schemes in the context of municipal theaters. *See* Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 555, 560 (1975) (holding that municipal theater is designated public forum and licensing scheme lacked procedural safeguards to prevent censorship).

[31] *Shuttlesworth*, 394 U.S. at 150. Under the ordinance, the city commissioners could deny a permit if they believed a march would be inconsistent with "public welfare, peace, safety, health, decency, good order, morals, or convenience." *Id.* at 149-50.

[32] *Id.* at 150-51. The Court cited a long line of cases, dating back to the 1930s, in which the Court had used an objective criteria test to strike down ordinances. *Id.* at 151 n.2; *see, e.g.*, Hague v. CIO, 307 U.S. 496, 516 (1939) (invalidating ordinance requiring permit to speak on public streets).

[33] *Shuttlesworth*, 394 U.S. at 150-51. The Court's purpose for requiring objective criteria is to prevent viewpoint discrimination. *See* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 760 (1988) (invalidating ordinance giving mayor unlimited authority over placement of newspaper vending machines). The Court warned that granting discretion to government officials "has the potential for becoming a means of suppressing a particular point of view." Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649 (1981); *see also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992) (invalidating parade ordinance that allowed government official to set permit fee).

II. *ARKANSAS EDUCATIONAL TELEVISION COMMISSION V. FORBES*

A. *Opinion of the Court*

In *Arkansas Educational Television Commission v. Forbes*, the Supreme Court held that a public broadcaster could exclude a candidate from a debate provided that the exclusion was reasonable and viewpoint-neutral.[34]

The Court first addressed the issue of whether public forum precedents apply to cases involving public broadcasters.[35] The Court explained that forum analysis does not apply to general programming decisions because subjecting broadcasters to First Amendment claims would undermine editorial discretion.[36] However, the Court also decided that candidate debates are a narrow exception to the rule because, first, the purpose of a debate is to allow candidates to explain their views with minimal editorial intrusion and, second, debates are exceptionally significant in the electoral process.[37]

---

[34] 118 S. Ct. 1633, 1637 (1988).

[35] *Forbes*, 118 S. Ct. at 1639. The FCC and the United States, appearing as amici curiae, argued that public forum analysis was inapplicable to the case. *See* Brief for the Federal Communications Commission and the United States as Amici Curiae Supporting Petitioner, at 16, *Forbes* (1997 WL 311464). The Solicitor General argued that the broadcasting regulatory scheme requires all licensees to serve the public interest, and the public interest is best served by wide editorial discretion. *Id.* at 16-18. The Solicitor General concluded that in the context of this regulatory scheme, the First Amendment "provides no basis for subjecting the editorial discretion of state-entity licensees . . . to greater scrutiny than the discretion of their counterparts in private commercial broadcasting." *Id.* at 20. According to the Solicitor General, the only legal safeguards against viewpoint discrimination in candidate exclusion cases are statutory and administrative rather than constitutional. *Id.* at 19.

[36] *Forbes*, 118 S. Ct. at 1638-40. The Court extended the rule of *Columbia Broadcasting System, Inc.* to hold that, in most cases, there is no First Amendment right of access to public broadcasting facilities. *Id.* at 1640. The Court recognized that public broadcasting stations, no less than private stations, require editorial freedom in order to "fulfill their journalistic purpose and statutory obligations." *Id.* at 1639. The Court also warned that subjecting public broadcasters to claims of viewpoint discrimination in their programming decisions would turn courts into editors. *Id.* at 1639-40.

[37] *Id.* at 1640-41. The Court concluded that these "special characteristics" of candidate debates dictate public forum analysis. *Id.* at 1640.

The Court then considered whether the debate was a limited public forum or a nonpublic forum.[38] The Court held that AETC had "made candidate-by-candidate determinations" as to which qualified candidates would participate.[39] The Court concluded that since AETC had intended to provide only selective access, the debate was a nonpublic forum.[40]

Finally, the Court considered whether AETC's exclusion of Forbes was constitutional.[41] The Court reiterated that the exclusion of a speaker from a nonpublic forum must be reasonable under the circumstances and must not be based on the speaker's viewpoint.[42] Since AETC had excluded Forbes because of his "objective lack of support" rather than his political beliefs, the Court upheld the exclusion.[43]

B. *Dissenting opinion*

The three dissenting justices stated that they would have required public broadcasters to use "pre-established, objective criteria" to determine whether a candidate may be excluded from a debate.[44] The dissenters also criticized the majority for understating the constitutionally important distinction between private and public broadcasting facilities.[45]

---

[38] *Id.* at 1641. The parties agreed that the AETC debate was not a traditional public forum. *Id.* at 1641-42.

[39] *Id.* at 1642-43. The Court set forth the general rule that if the government "does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, 'obtain permission,'" then the government has created a nonpublic forum. *Id.* at 1642 (citing Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 804 (1983)).

[40] *Id.* at 1642. Conversely, if AETC had intended to make the property generally available to all candidates, then it would have created a limited public forum. *Id.*

[41] *Id.* at 1644. Since viewpoint neutrality is required, AETC did not have "unfettered power to exclude any candidate it wished." *Id.* at 1640, 1643.

[42] *Id.* at 1644. The Court reviewed testimony from the trial which suggested that the exclusion was both reasonable and viewpoint neutral. *Id.* at 1643-44.

[43] *Id.* The Court also defended its decision on policy grounds. *Id.* at 1643. The Court argued that if every qualified candidate had a right to participate in state-sponsored debates, broadcasters would have to choose between admitting all candidates and presenting a cacophony of voices or excluding minor candidates and facing possible liability. *Id.* The Court speculated that, given those options, most broadcasters would rather not sponsor debates at all. *Id.* Thus, the Court claimed that *Forbes* would actually promote speech rather than restrict it. *Id.* at 1643.

[44] *Id.* at 1649 (Stevens, J., dissenting). The dissent does not argue that all

III. DISCUSSION

In *Arkansas Educational Television Commission v. Forbes*, the Supreme Court emphasized that the First Amendment's guarantee of viewpoint neutrality applies in candidate exclusion cases involving public broadcasters.[46] The Court thus rejected the government's argument, based upon *Democratic National Committee*, that First Amendment safeguards should not apply when state-owned television stations exclude candidates from debates.[47] At the same time, the Court rejected the lower court's holding that decisions to exclude candidates from debates must be subject to strict scrutiny.[48] In taking

---

qualified candidates are entitled to debate. *Id.* (Stevens, J., dissenting). The dissent would only require that state agencies, in order to avoid viewpoint discrimination, use objective criteria to exclude candidates. *Id.* at 1649-50 (Stevens, J., dissenting). The dissent argued that AETC had nearly limitless discretion to exclude candidates and that AETC's control over the forum was analogous to the city commission's power to issue permits in *Shuttlesworth*. *Id.* at 1645, 1647-48 (Stevens, J., dissenting).

[45] *Id.* at 1644 (Stevens, J., dissenting). The dissent emphasized that the First and Fourteenth Amendments apply only to state actors, which would include public television commissions such as AETC but not private broadcast licensees. *Id.* at 1646 (Stevens, J., dissenting) (citing *Columbia Broadcasting System, Inc.*, 412 U.S. at 116 (plurality)). According to the dissent, the majority blurred this distinction between public and private broadcasters by emphasizing the need for editorial freedom and the statutory obligations common to all broadcasters. *Id.* (Stevens, J., dissenting). The dissent warned that deference to public broadcasters' programming decisions involves a risk of censorship not present in private broadcaster cases. *Id.* at 1647 (Stevens, J., dissenting).

[46] *See supra* notes 22, 28, and accompanying text. After *Forbes*' rejection of the Eleventh Circuit's approach, candidates who are excluded from debates and allege viewpoint discrimination will not have to rely primarily upon administrative or statutory remedies. *See supra* note 15.

[47] *See supra* notes 12, 14, 15 and accompanying text. The Solicitor General's argument provided no First Amendment safeguards against viewpoint discrimination in candidate exclusion cases. *See supra* note 35.

[48] *See supra* notes 6, 7 and accompanying text. The lower court's holding was most protective of speech, since the strict scrutiny standard provides an almost impregnable safeguard against viewpoint discrimination. *See supra* note 21 and accompanying text.

the middle ground, the Court relied heavily on public forum analysis.[49] However, the Court decided that public forum analysis applied only because of the special characteristics of political candidate debates.[50] The dissenting justices, like most lower courts, would have required viewpoint neutrality in candidate exclusion cases based upon the more conventional ground that public broadcasters are state actors.[51]

The dissenting justices would also have provided greater constitutional protection against viewpoint discrimination by requiring narrow and objective criteria for excluding candidates.[52] The avowed purpose of such criteria is to ensure viewpoint neutrality, and the Court could have strengthened its neutrality requirement by also requiring objective criteria.[53]

IV. CONCLUSION

Arkansas Educational Television Commission v. Forbes settles the question of whether public forum analysis applies in candidate exclusion cases involving public broadcasters. As a practical matter, it places candidate debates in the category of nonpublic fora. With regard to First Amendment safeguards against viewpoint discrimination, *Forbes* sends an ambivalent message to broadcasters and candidates. Nonpublic fora are subject to First Amendment scrutiny, and decisions to exclude candidates must be viewpoint neutral. However, under *Forbes*, broadcasters need not follow established, narrow, and objective criteria for excluding candidates.

---

[49] *See supra* notes 35-37, and accompanying text. The Court could have addressed the question of viewpoint discrimination without focusing on what kind of forum AETC had created. *See supra* note 28.

[50] *See supra* note 37 and accompanying text. Although the Eleventh Circuit approach understated the differences between public and private broadcasters, it did not distinguish between candidate debates and general programming. *See supra* notes 15, 45, and accompanying text.

[51] *See supra* notes 15, 44 and accompanying text. Most lower courts would have reasoned that since public broadcasters are state actors, public forum analysis normally applies, although general programming decisions may present an exception to the rule. *See supra* note 15. The Supreme Court passed over the distinction between public and private broadcasters and instead focused on the distinction between debates and programming. *See supra* notes 36-37, and accompanying text.

[52] *See supra* note 44 and accompanying text. The dissent fears that broadcasters could find a reasonable and facially neutral justification after excluding candidates. *See supra* note 44 and accompanying text.

[53] *See supra* notes 32-33 and accompanying text. Although the majority did not require pre-established criteria, they insisted that AETC based its exclusion of Forbes on objective factors, such as his lack of voter support. *See supra* note 42-43 and accompanying text.

Billy Berryhill